Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CAROLYN H. MAFRIGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ricardo E. Morales
Counsel of Record
Richard G. Morales, Jr.
Baldemar Garcia, Jr.
Person, Whitworth, Ramos,
Borchers & Morales, L.L.P.
602 E. Calton Road
Laredo, Texas 78041
(956) 727-4441
Attorneys for Petitioner

122pp

QUESTIONS PRESENTED

1. Whether the Government's leasing of Carolyn H. Mafrige's ("Mrs. Mafrige") minerals for below market value constitutes an unconstitutional taking of her property without just compensation.

2. Whether Mrs. Mafrige's breach of fiduciary duty claim against the Government is barred by the discretionary function exception to the Federal Tort Claims Act. Within this question lies the unresolved issue of whether a mandatory policy established internally or on a case by case basis satisfies this Court's "mandatory policy" requirement for purposes of discretionary function analysis.

3. Whether the denial of Mrs. Mafrige's right of recovery against the Government is a violation of the equal protection component of the Due Process Clause

4. Whether the court of appeals erred in affirming the district court's dismissal of Mrs. Mafrige's negligent leasing claim.

PARTIES

Petitioner is Mrs. Mafrige. Mrs. Mafrige was originally a Defendant in the underlying action in the United States District Court for the Southern District of Texas, Laredo Division, but was later realigned as a Plaintiff. Mrs. Mafrige was the Appellant in the Fifth Circuit Court of Appeals.

Respondent is the United States of America ("Government"). The Government was a Defendant in the underlying cause of action and was the Appellee in the Fifth Circuit Court of Appeals.

Louis Dreyfus Natural Gas Corporation ("Dreyfus") is the successor to Dekalb Energy Texas, Inc.'s ("Dekalb") interest in the subject oil and gas lease. Dekalb was originally the Plaintiff in the underlying action. During the pendency of the litigation in district court, Dreyfus was substituted for Dekalb and realigned as a Defendant. Dreyfus has no interest in this Appeal.

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PETITION FOR A WRIT OF CERTIORARI

Mrs. Mafrige hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO THE OPINIONS OF THE COURT BELOW

The decision of the court of appeals is reported as *Mafrige v. U.S.*, 189 F.3d 466 (5th Cir. (Tex.) 1999), without the court's opinion. The court of appeals decision and unpublished opinion is reprinted in the Appendix to the Petition ("App.") at 1a. A preliminary opinion and order of the United States District Court containing an analysis of this case is reported as *Mafrige v. U.S.*, 893 F. Supp. 691 (S.D.Tex. 1995). App. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1999. App. 1a. A timely petition for rehearing was denied on October 1, 1999. App. 44a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> No person shall . . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent sections of title 28 U.S.C. §1346(b)(1) and §2680(a) are reprinted in the Appendix at 45a and 46a.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Introduction

This case arises out of the Government's purchase of the surface and the executive mineral rights to 365.41 acres of land in McMullen County, Texas ("Tract") owned by Mrs. Mafrige and her mother Edna Gibbens Henry ("Mrs. Henry"). In obtaining the executive rights, the Government took exclusive control over the right to lease Mrs. Mafrige's and Mrs. Henry's mineral interest. As holder of the executive rights, the Government became a trustee over the minerals and assumed a fiduciary duty to Mrs. Mafrige and Mrs. Henry. The Government later leased Mrs. Mafrige's minerals for far below

market value thereby violating its fiduciary duty and violating the Fifth Amendment's requirement that property not be taken without just compensation.

B. The Government's Acquisition of Mrs. Mafrige's Executive Rights

1. The Negotiation

In 1978, the United States Department of the Interior ("DOI") was engaged in the "Nueces River Project" for the construction of the Choke Canyon Dam. As a part of the project, the DOI determined that it would require the Tract owned by Mrs. Mafrige and Mrs. Henry. Negotiations ensued and an agreement was reached wherein the Government would purchase the surface of the Tract as well as the executive rights to the minerals. Mrs. Henry and Mrs. Mafrige retained a full nonparticipating royalty interest ("NPRI"), thereby retaining the right to receive royalty payments from future oil and gas leases executed by the Government.

2. The Government's Policy

During the course of the negotiations, Mrs. Henry expressed concern regarding the leasing of minerals within the Nueces River Project. Allen C. Gates, acting as Project Construction Engineer for the Bureau of Reclamations ("BOR"), a division of the DOI, responded by describing what the Government's mineral leasing policy would be for the Tract via a letter dated July 2, 1979 ("Policy Letter"). App. 70a. The top right hand corner of the Policy Letter indicates that it was approved by eight other Government officials including Mr. Gates. The Policy Letter, written only two days before Mrs. Mafrige and Mrs. Henry executed a warranty deed to the Government, states that:

> It is the policy of this agency, as well as the United States, to lease property for oil and gas exploration and development. It is also a policy of the United States that, when a lease is negotiated, it will be for no less consideration (bonuses, delayed rentals, and royalties) than the consideration of other similar leases on adjoining property. With this in mind, when the Government would negotiate a lease for the property you are conveying to the United States, the royalty would be no less than similar leases on the adjacent and adjoining property not owned by the Government. I hope this information answers your question regarding the Bureau of Reclamation's leasing policies. (emphasis added). *Id.*

Following Mrs. Henry's death, Mrs. Mafrige inherited all of Mrs. Henry's interest in the minerals underlying the Tract.

C. The Oil and Gas Lease

By 1988, much of the area surrounding the Tract was subject to oil and gas leases. Stevens F. Mafrige, Mrs. Mafrige's husband, testified that the Tract had "production both to the North, to the South, the East and the West. Just about everywhere." App. 78a. The Tract was essentially "an island" surrounded by mineral production. App. 78a. These surrounding leases, negotiated before there was "production in the area" were already "paying a 3/16ths royalty". App. 78a. Thus, by 1988, 1/8 royalty leases in the surrounding area of the Tract were "history" while ¼ royalty leases were now possible. App. 78a, 82a.

Despite the fact that the Tract was in a proven, producing field, on October 1, 1988, the Government, acting through the Bureau of Land Management ("BLM"), another division of the DOI, leased the minerals under the Tract to

Royal Oil & Gas Corporation for a 1/8 royalty (the "1988 Lease"). See App. 52a–53a. As expected, mineral production was soon obtained from the Tract. Because the Government failed to obtain the market value of the royalty for the 1988 Lease, Mrs. Mafrige received only half the value of her NPRI.

II. PROCEEDINGS BELOW

A. The District Court

On September 5, 1991, Dekalb Energy Texas, Inc. ("Dekalb"), as Royal Oil & Gas Corporation's successor in interest to the 1988 Lease, instituted this case by filing a complaint against the Government over an outstanding 1/32 term overriding royalty interest. Soon after, Dekalb joined Mrs. Mafrige as a defendant. Mrs. Mafrige then filed a cross-claim against the Government alleging, *inter alia*, the Government's breach of various duties owed to Mrs. Mafrige in executing the 1988 Lease. App. 9a. The district court maintained jurisdiction over this case based on the fact that, *inter alia*, this case is a civil action against the United States for money damages and for injury or loss of property caused by the negligent or wrongful acts or omissions of Government employees while acting within the scope of employment. *See* 28 U.S.C. §1346(b). Furthermore, the district court maintained jurisdiction over this case based on 28 U.S.C. §1367(a) and §1346(f).

On July 6, 1995, the district court dismissed Mrs. Mafrige's claims for negligent leasing, presumably pursuant to Fed.R.Civ.P. 12(b)(6). App. 22a–23a. On August 12, 1996, and in response to the Government's Fed.R.Civ.P. 12(b)(1) motion to dismiss, the district court dismissed Mrs. Mafrige's claims for breach of fiduciary duty pursuant to the discretionary function exception to the Federal Tort Claims Act. App. 33a.

On August 22, 1997, the district court, after a bench trial, entered a final Judgment dismissing, *inter alia*, Mrs. Mafrige's claims under the Federal Tort Claims Act pursuant to the district court's order of August 12, 1996. App. 39a.

B. The Appeal

On appeal, the three-judge panel of the Fifth Circuit Court of Appeals affirmed the district court's judgment for "essentially the same reasons set forth in its memorandum order dated August 12, 1996." App. 1a.

SUMMARY OF THE ARGUMENT

By refusing to provide Mrs. Mafrige with the fair market value of her mineral royalty interest, the Government has effectuated nothing short of an unconstitutional taking of private property for public use without just compensation. It is beyond dispute that a government taking occurred when Mrs. Mafrige was deprived of the full value of her royalty interest. Further, the Government's decision to lease Mrs. Mafrige's minerals for less than their fair market value cannot be disputed. For purposes of determining what the Government owes when it takes private property, just compensation is synonymous with fair market value. Therefore, an unconstitutional taking of private property for public use without just compensation has transpired in contravention of the Fifth Amendment to the U. S. Constitution.

The court of appeals erred in affirming the district court's conclusion that Mrs. Mafrige's breach of fiduciary duty claim is barred by the discretionary function exception to the Federal Tort Claims Act. Under precedent established by this Court in *United States v. Gaubert*, 499 U.S. 315 (1991), the Government waives immunity if either the act complained of did not involve an element of judgment or choice, such act

involved mandatory compliance with a policy and/or such act was not based on considerations of public policy.

As recognized by this Court in *Gaubert*, governmental agencies may establish mandatory policy on a case by case basis or based on internal guidelines. The Policy Letter recognizes a mandatory policy established pursuant to the teaching of *Gaubert* thereby eliminating the Government's discretion to lease the minerals it held in trust for Mrs. Mafrige for below market value.

In addition, the Government's acceptance of a 1/8 royalty for the 1988 Lease is clearly beyond the scope of the existing regulatory regime as such regime does not contemplate a situation of mineral interests *controlled* by the government yet *owned* by private individuals. Furthermore, the Government's act of leasing the Tract for a 1/8 royalty for the sole benefit of Mrs. Mafrige cannot, by definition, be a matter of public policy. Thus, the Government's acceptance of a 1/8 royalty was not based on considerations of public policy. Since none of the *Gaubert* requirements can be satisfied, the Government has waived immunity from suit in this case.

A denial of relief to Mrs. Mafrige will accomplish a denial of equal protection under the laws of this Nation. Similarly situated Native Americans have redress for the appropriation of their real property by the Government. Mrs. Mafrige, on the other hand, does not. Such a distinction in treatment by the law of this land creates a suspect class based on national origin. Moreover, Mrs. Mafrige's fundamental, constitutional right to Just Compensation for the taking of her property is implicated in this Appeal. Such a legal disparity in positions is subject to strict scrutiny and can be upheld only if found necessary to advance a compelling governmental interest. Such a daunting legal review can be obviated by merely

treating Mrs. Mafrige as an equal with Native Americans. Our Constitution requires nothing less.

Additionally, the court below erred in affirming the district court's dismissal of Mrs. Mafrige's negligent leasing claim. Texas courts have consistently recognized negligence actions against a trustee as viable, cognizable causes of action in addition to claims for breach of fiduciary duty.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE MRS. MAFRIGE'S RIGHT TO JUST COMPENSATION UNDER THE FIFTH AMENDMENT HAS BEEN VIOLATED

Mrs. Mafrige would respectfully suggest to this Court that the Government transgressed the Just Compensation Clause of the Fifth Amendment to the United States Constitution when it deprived her of the fair market value of her mineral royalty interest. U. S. CONST. amend. V. Such an unprecedented denial of Mrs. Mafrige's constitutional rights should not be given the imprimatur of this Court. A writ of certiorari is hereby requested so that this Court may correct an error of constitutional magnitude.

The fundamental protections of the Just Compensation Clause are hardly a matter of dispute before this Court. "The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvement so that they will fall upon the public rather than wholly upon those who happened to lie in the path of the project." *U. S. v. Willow River Power Co.*, 324 U.S. 499, 502, 65 S.Ct. 761, 764, 89 L.Ed. 1101 (1945). Similarly, this Court has held that the Just Compensation Clause:

"'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' [*Armstrong v. U.S.*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)]. Accordingly, one of the central concerns of our takings jurisprudence is 'prevent[ing] the public from loading upon one individual more than his just share of the burdens of government.' *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325, 13 S.Ct. 62, 626, 37 L.Ed. 463 (1893)."

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)(Stevens, J., dissenting).

In less abstract terms, "just compensation [of private property] is its value at the time of the taking." *West v. Chesapeake & Potomac Telephone Co. of Baltimore City*, 295 U.S. 662, 671, 55 S.Ct. 894, 897, 79 L.Ed. 1640 (1935). Just Compensation has been held to be the equivalent of "the fair market value of the property when appropriated." *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1, 10, 104 S.Ct. 2187, 2194, 81 L.Ed.2d 1 (1984). Just Compensation, as defined by this Court, "includes all elements of value that inhere in the property, but it does not exceed market value fairly determined." *Olson v. U.S.*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934).

Following the conveyance of the Tract to the Government, Mrs. Mafrige was left with only an unprotected royalty interest in any mineral lease the Government might choose to negotiate on the land it had obtained from her. Despite the Government's promise that it favored mineral leases on its real property and that it would obtain no less than comparable royalty in the event a mineral lease was executed,

the Government inexcusably leased Mrs. Mafrige's minerals for one-half of its fair market value. App. 82a. This ill-fated decision deprived Mrs. Mafrige of the just compensation she deserves and has forced her to reluctantly attempt to litigate in this nation's highest court.

The Government cannot be allowed to purchase property from private citizens under the threat of condemnation only to provide less consideration than the just compensation required by the U. S. Constitution. When the Government took Mrs. Mafrige's surface estate, it ostensibly paid her just compensation. However, when the Government took Mrs. Mafrige's executive rights to her mineral estate, her just compensation was to come only in the form of a royalty interest in any mineral lease that might be negotiated in the future. Clearly, Mrs. Mafrige's private property right to lease her minerals for fair market value royalty was taken for the benefit of the Government and the public. By leasing the affected minerals for a royalty which is less than half of its fair market value, the Government effected its taking of Mrs. Mafrige's private property for public use without just compensation. Rather than explain or justify its glaring shortcomings towards Mrs. Mafrige, the Government has opted to hide behind its self-proclaimed non-liability to her. Such a departure from what is right has been characterized by the Government as insulated "discretion" beyond reproach under the Federal Tort Claims Act. Fortunately for Mrs. Mafrige, the Government's conduct cannot be mischaracterized before this Court as constitutional in light of the Fifth Amendment's guarantee of just compensation. An unmistakable Government taking of private property for public use has occurred, and it has been conclusively established that just compensation has not been tendered. This Court must now only act to redress this grievance.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW CONFLICT WITH THIS COURT'S PRIOR RULING IN *U.S. V. GAUBERT*, 499 U.S. 315 (1991)

A. The Government's Duty To Mrs. Mafrige as a Fiduciary

An 'executive rights' holder maintains the exclusive right to take or authorize all actions which affect the exploration and development of the mineral estate. *Ernest E. Smith and Jacqueline L. Weaver, Texas Law of Oil and Gas*, §2.6 at 63 (1997). This right includes the exclusive right to execute all oil and gas leases for the property. *Id.* With the execution of the warranty deed granting the surface and executive rights to the Government, Mrs. Mafrige, as the nonparticipating royalty owner, became completely dependent upon the actions of the Government in realizing any income from her royalty interest. *See Id.* at §2.6(F) at 70. Because of this dependence, Texas courts have imposed upon the executive rights holder a duty of utmost good faith and fiduciary duty to the nonexecutive. *See Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984), *Mims v. Beall*, 810 S.W.2d 876 (Tex. App.--Texarkana 1991, no writ), *Schlittler v. Smith*, 101 S.W.2d 543 (Tex. Comm. App. 1937), *Hawkins v. Twin Montana, Inc.*, 810 S.W.2d 441 (Tex. App.--Fort Worth 1991, no writ). A fiduciary is defined as "a person holding the character of a trustee . . . in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires". *Black's Law Dictionary* 625 (6th Ed., 1990). Similarly, a fiduciary duty is defined as:

> A duty to act for someone else's benefit, while subordinating one's personal interests to that of another person. It is the highest standard of duty implied by law. (emphasis added) *Id.* at 625.

The Fifth Circuit Court of Appeals, in interpreting Texas law, has recognized that a fiduciary duty imposes extraordinary duties and requires the fiduciary to put the interests of the beneficiary ahead of its own if the need arises. *Imperial Premium Finance, Inc. v. Khoury*, 129 F.3d 347, 353 (5th Cir. 1997).

Within this duty of utmost good faith and fiduciary duty lies the duty to obtain a lease royalty at least equal to the royalty offered in the area. *See Dearing, Inc. v. Spiller*, 824 S.W.2d 728 (Tex. App.--Fort Worth 1992, writ denied). In *Spiller*, an executive leased mineral rights to a relative for a 1/8 royalty after rejecting an offer from another company for a 1/4 royalty. *Dearing*, 824 S.W.2d at 731. The jury returned a verdict against the executive and the court of appeals affirmed while emphasizing, among other things, the executive's failure to provide for a lease royalty at least equal to the royalty offered in the surrounding area. *Dearing*, 824 S.W.2d at 730. Mafrige's claim of breach of duty of utmost good faith and fiduciary duty is thus a viable, recognized tort cause of action under Texas law.

Furthermore, on July 6, 1995, the district court, in denying the Government's first motion to dismiss Mrs. Mafrige's breach of fiduciary duty claim, held that:

> Because there can be no doubt that [the] Secretary [of the Interior had] the authority to purchase an executive interest, i.e., the right to lease the mineral fee, or any other right needed to complete a reclamation project, it must also be deemed to give the Secretary authority to assume any duties that correspond to the right acquired. In this case, the executive right carries with it the concomitant duty to lease the mineral fee for the benefit

of nonparticipating royalty interest owners. (emphasis added). App. 25a.

Thus, the district court held that the Government, as holder of the executive rights, assumed its duties of good faith and fiduciary duties to Mrs. Mafrige. *Id.* The Government did not appeal this ruling and therefore the assumption of such duty is not an issue in this Appeal.

B. The Government Breached Its Fiduciary Duty

By 1988, the Tract was surrounded by production. Because the Tract was an "island within a producing field", a 1/4 royalty would be a "bare minimum". App. 82a. The fact that the Tract was surrounded by production made a 1/8 royalty lease "ludicrous." App. 78a. The Government, completely ignoring this reality, negotiated a lease with a royalty lower than the surrounding area and less than the prevailing market rate. App. 78a, 82a–83a. Consequently, the 1988 Lease became a "tremendous coup" for the lessee oil company. App. 82a. Under *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984) and its progeny, the Government's conduct is a clear breach of its fiduciary duty and its duty of utmost good faith. *See Dearing*, 824 S.W.2d 728.

C. The Federal Tort Claims Act

Under 28 U.S.C. §1346(b), the Government waives sovereign immunity for certain claims and grants federal district courts jurisdiction over such claims. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994). Such claims are those:

(1) against the United States

(2) for money damages . . .

(3) for injury or loss of property . . .

(4) caused by the negligent or wrongful act or omission of any employee of the Government.

(5) while acting within the scope of his office or employment,

(6) under circumstances where the Government, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. ("FTCA")

28 U.S.C. §1346(b)(1) (1999).

This waiver of sovereign immunity is limited and shall not apply to:

> Any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §2680(a) (1995).

D. The Standard Of Review

Because the district court dismissed Mrs. Mafrige's breach of fiduciary duty claim pursuant to Fed.R.Civ.P. 12(b)(1), the court of appeals should have reviewed the decision de novo using the same standards employed by the district court. *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995); *Benton v. United States*, 960 F.2d 19, 21 (5th Cir.1992).

Furthermore, the court of appeals was required to take as true all of the allegations of the complaint and the facts as set out by the appellant. *Garcia v. United States*, 776 F.2d 116, 117 (5th Cir.1985).

E. The Policy Letter Establishes and Recognizes a Mandatory Policy

Application of the "discretionary function" exception is governed by this Court's two part test discussed in *United States v. Gaubert*, 499 U.S. 315 (1991). First, in order to apply the discretionary function exception, the act complained of must involve an element of "judgment or choice" and must not involve mandatory compliance with a "federal statute, regulation, or policy . . . " *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Failure to satisfy this first prong bars application of the discretionary function exception altogether and results in the Government's waiver of immunity.

With regard to the establishment of Government policy, this Court recognized that:

> Not all agencies issue comprehensive regulations[].Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations.
>
> *Gaubert*, 499 U.S. at 324 (emphasis added).

This Court recognized that a mandatory policy may exist without the promulgation of a comprehensive regulation. Therefore, evidence of a mandatory policy can come from

sources other than the Code of Federal Regulations or the United States Code. The Policy Letter is an obvious example of a policy established through "internal guidelines" or on a "case-by-case-basis". *See Id.* Thus, the lack of a published regulation mirroring the policy described in the Policy Letter does not disprove the policy's existence. On the contrary, the fact that the Policy Letter was written and approved by eight other Government officials is conclusive evidence of the mandatory policy's existence. This should be considered in light of the fact that on a motion to dismiss, Mrs. Mafrige is not required to prove the existence of a mandatory policy. *See Berkovitz*, 486 U.S. at 548-549. At the very least, the court below should have held that the Policy Letter presents a genuine issue of material fact as to whether such a policy exists.

The language of the Policy Letter stresses repeatedly that when an oil and gas lease is negotiated in the future, it will be for "no less" than the consideration of other leases on adjoining property. This language reveals a policy couched in mandatory terms and removes judgment or choice regarding the royalty that could be obtained in leasing the Tract. The Government violated this clear and unequivocal policy by leasing Mrs. Mafrige's minerals for a royalty below market value. The Government's failure to adhere to the mandatory policy destroys the protection afforded by the "discretionary function exception." *See Berkovitz*, 486 U.S. at 536.

Because the first prong of the *Gaubert* test cannot be satisfied, Government immunity has been waived in this case.

F. The Leasing Of Mrs. Mafrige's Royalty Was Not Grounded In Public Policy

Second, if the act complained of does involve an element of judgment or choice, then such act must be based upon "considerations of public policy." *Gaubert*, 499 U.S. at

315 (quoting *Berkovitz*, 486 U.S. at 537 (1988). This second prong of the *Gaubert* test requires an inquiry as to whether the act in question is "susceptible to policy analysis." *Baldassaro v. United*, 64 F.3d 206, 211 (5th Cir. 1995) *cert. denied*, 116 S.Ct. 1823 (1996). The act will not be based upon considerations of public policy if the act cannot "be said to be grounded in the policy of the regulatory regime." *ALX El Dorado, Inc., v. Southwest Savings and Loan*, 36 F.3d 409, 411 (5th Cir. 1994). Failure to satisfy the second prong results in a waiver of sovereign immunity.

Consideration of the second prong of the *Gaubert* test requires an inquiry into whether the act or decision complained of is "based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537). Furthermore, the act complained of will not be based upon considerations of public policy if the act cannot "be said to be grounded in the policy of the regulatory regime." *ALX El Dorado, Inc., v. Southwest Savings and Loan*, 36 F.3d 409, 411 (5th Cir. 1994).

In discussing the second part of the *Gaubert* test, this Court recognized that:

> [t]here are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception [to the Federal Tort Claims Act] because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that

> discretion can hardly be said to be grounded in regulatory policy.

United States v. Gaubert, 499 U.S. at 25, n. 7 (emphasis added).

Application of the second prong of the *Gaubert* test requires identification of the precise "act" complained of. In fact, the 1988 Lease required various "acts" which include, among others, the acceptance of a certain amount of bonus payment, the acceptance of a certain amount of delay rental and the acceptance a certain amount of royalty. The specific "act" complained of in the instant case was the Government's acceptance of a 1/8 royalty for the 1988 Lease. Such act was carried out solely for the benefit of Mrs. Mafrige.

1. The Act of Leasing Mrs. Mafrige's Royalty Lies Outside the Scope of the Existing Regulatory Regime

The regulatory regime dealing with the leasing of government owned minerals is located at 43 CFR 3000 *et. seq* (1997). These regulations contemplate leases for which royalty shall be payable only on "mineral interest[s] owned by the United States." *Id.* at §3103.3-1. They do not, however, contemplate or even mention the leasing of minerals controlled by the Government but owned by a private individual. It therefore follows that the instant case falls outside the regulatory regime for Government owned minerals.

On the other hand, separate regulations exist dealing with the disposition of "interests in lands the title to which is held in trust by the United States . . ." *See* 25 CFR 200, *et. seq*, §211.1 (1997). The regulations at 25 CFR 200, *et. seq* have been promulgated for the benefit of Indian mineral owners and serve to highlight the sharp contrast existing between the regulatory regime for Government *owned* minerals and

Government *controlled* minerals belonging to the Indians. *See Id.* With regard to such minerals "held in trust":

> The Secretary shall not approve leases with a royalty less than 16 2/3 percent of the amount or value of production produced and sold from the lease unless a lower royalty rate is agreed to by the Indian mineral owner and is found to be in the best interest of the Indian mineral owner. (emphasis added). *Id.* at 211.41(b).

The Department of the Interior has therefore recognized the Government's fiduciary relationship with Indian mineral owners and has implemented regulations requiring consideration of the "best interest[s]" of the nonexecutive in administering oil and gas leases.

Thus, with the promulgation of 43 CFR 3000 *et. seq*, the Department of the Interior established a regulatory regime covering the disposition of Government *owned* lands while 25 CFR 200, *et. seq*, established a regime covering the disposition of Government *controlled* Indian lands. Somewhere between these two regimes but not belonging within either lies the instant case, a situation where the Government controls the disposition of non-Indian lands. This situation is not contemplated by either of the regimes identified above and therefore lies outside of "the purposes that the regulatory regime seeks to accomplish." *See Gaubert*, 499 U.S. at 25, n. 7, *see also ALX El Dorado, Inc., v. Southwest Savings and Loan*, 36 F.3d 409, 411 (5th Cir. 1994).

2. An Act for the Sole Benefit of One Person Cannot be Grounded in Public Policy

By executing the 1988 Lease, the Government, negotiated to receive bonus and delay rental payments for its

sole benefit, while the negotiation of the royalty clause was performed solely for the benefit of Mrs. Mafrige. The public received no benefit from this royalty payment. It was simply an act by the Government, as trustee, for the sole benefit of its beneficiary.

The word 'public' is defined as "1. of, pertaining to, or affecting a population or community as a whole . . . 2. done, made, acting, etc., for the community as a whole . . ." (emphasis added). *Webster's Encyclopedic Unabridged Dictionary of the English Language* 1562 (1996 ed.). The Government's acceptance of a 1/8 lease royalty for the sole benefit of Mrs. Mafrige did not pertain to or affect the population as a whole. By definition, such act was not for a 'public' purpose but rather for a 'private' purpose. It therefore stands to reason that an act executed for the sole benefit of a private individual and not for the benefit of the population as a whole cannot be grounded in public policy.

Since the Government's acts do not satisfy either prong of the *Gaubert* test, the discretionary function exception does not apply. The Government has therefore waived immunity from suit in this case and Mrs. Mafrige should be allowed to pursue her breach of fiduciary duty claim.

III. THE PETITION SHOULD BE GRANTED BECAUSE MRS. MAFRIGE'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT HAS BEEN VIOLATED

In contexts similar to Mrs Mafrige's, Native Americans have found protection against wrongful deprivations of their property interests. Such well-founded protections have come not by way of Congress or state legislatures but from federal jurisprudence emanating from sources as high as this Court. As a result of this federal common law and the U. S. Constitution,

a denial of her right of recovery in this civil action would violate the Equal Protection component of the Due Process Clause of the Fifth Amendment to the U. S. Constitution.

This Court has recognized that a fiduciary relationship arises with the Government's control over Native American lands and "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *United States v. Mitchell*, 463 U.S. 206, 225-226 (1983). More than forty (40) years earlier, the Federal Government's relationship with regards to Native Americans was aptly defined as a:

> distinctive obligation of trust incumbent upon the Government in its dealings with these ... people. ... [The Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with [Native Americans], should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. U.S., 316 U.S. 286 (1942).

In *Bailey v. Banister*, 200 F.2d 683 (10th Cir. 1952), the Government was further found to have a duty to obtain the best possible price for a Native American's property that was controlled by the government. The Tenth Circuit subsequently held that because of the Government's control over such property, the Government's "discretion to approve or disapprove leases and communitization agreements must be governed by fiduciary standards and limited by fiduciary duties." *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 588 (10th Cir. 1992) *cert. denied* 507 U.S. 1003 (1993). The Government's discretion therefore is "limited by the fiduciary responsibilities vested in the United States as trustee . . ." *Id.* The *Cheyenne* Court also acknowledged the

fact that the Government's fiduciary duty is not "expressly" stated by statute, but rather such duty arises from the "Government's control" of "tribal monies or properties." *Id.*

The Government's control over Mrs. Mafrige royalty is precisely the type of control contemplated by the *Mitchell* and *Cheyenne* Courts. Therefore, to allow Native Americans the right recover in damages for the Government's breach of fiduciary duty but deny Mrs. Mafrige such right is a violation of her right to the equal protection guaranteed under the Due Process Clause of the Fifth Amendment of the United States Constitution. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed.884 (1954); *Schweiker v. Wilson*, 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981); *NAACP v. Thomas County*, 571 F.2d 257, 260 (5th Cir. 1978).

The federal jurisprudence imposing a fiduciary duty upon the Government with regards to its control over Native American lands and rendering the Government liable in damages for any resulting breach is laudable. However, if Mrs Mafrige, who is similarly situated, is not afforded the same remedy in this case, she will be denied the equal protection contemplated by the U. S. Constitution. To expound, if subjected to a constitutional challenge, the federal cases highlighted above would obviously be subject to strict scrutiny given that a suspect class based on national origin, *i.e.*, Native American ancestry, has been created. *Hernandez v. Texas*, 347 U.S. 475, 477-78, 74 S.Ct. 667, 670, 98 L.Ed. 866 (1954). The mere fact that Native Americans are benefited, and not harmed, by the line of federal decisions safeguarding their lands does not affect the strict scrutiny standard of review that would apply. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493-94, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989). Further supporting a strict scrutiny standard of review would be Mrs. Mafrige's fundamental, constitutional right to just

compensation implicated by this case. *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S.Ct. 1322, 1333, 22 L.Ed.2d 600 (1969). Hence, in order for the relevant federal opinions to pass constitutional muster, they must be necessary for purposes of advancing a compelling governmental interest. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 106 S.Ct. 1842, 1874, 90 L.Ed.2d 260 (1985).

Mrs. Mafrige would respectfully suggest that a constitutional analysis of the above cited federal authority can be effectively side-stepped by merely affording her a remedy against the Government for the wrongful deprivation of the fair market value of her royalty interest. Moreover, allowing Mrs. Mafrige to recover the fair market value of her royalty interest from the Government will serve to update and reaffirm the federal case law that has heretofore been deferential to Native Americans only.

IV. THE PETITION SHOULD BE GRANTED BECAUSE THE COURTS BELOW MISINTERPRETED THE RELATIONSHIP BETWEEN FIDUCIARY DUTIES AND THE DUTY OF REASONABLE CARE

The court of appeals erred in affirming the district court's dismissal of Mrs. Mafrige's claims for negligent leasing. The district court supported such dismissal on the basis that the fiduciary duty owed to Mrs. Mafrige is a higher standard than "the duty of reasonable care associated with negligence law" and therefore Mrs. Mafrige's claim "does not sound in simple negligence." App. 22a–23a. The district court did not apply the discretionary function exception to Mrs. Mafrige's negligent leasing claim as such claim was dismissed over a year before the district court applied the discretionary

function exception to this case by dismissing Mrs. Mafrige's breach of fiduciary duty claim.

The Fifth Circuit along with the Texas Supreme Court has recognized that common-law negligence "consists of three essential elements--a legal duty owed by one person to another, a breach of that duty, and damages proximately resulting from the breach." *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997) *petition for cert. filed* (Jan 8, 1998) *quoting from El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex.1987). Among these three elements, duty is the threshold inquiry. *Sabatino*, 120 F.3d at 591-592. As shown above, the Government's reservation of the executive rights to the Tract conclusively establishes its duty of good faith and fair dealing and fiduciary duty to Mrs. Mafrige.

In situations involving trustees, Texas courts recognize that claims based on both a breach of fiduciary duty and negligent administration of a trust are viable, cognizable causes of action. *See Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109 (Tex. App.--Waco 1981 writ refused, n.r.e.) and *Penix v. First Nat. Bank of Paris*, 260 S.W. 2d 63 (Tex. App.--Texarkana 1953, writ refused). *Jewett* involved claims brought by trust beneficiaries against a trustee for both breach of fiduciary duty and negligent administration of the trust. *Jewett*, 618 S.W.2d at 110. Both claims were originally dismissed by the trial court, but the Waco Court of Appeals reversed and remanded the case for trial because of the existence of a fact issue regarding the trustee's "negligence and [] breach of its fiduciary duty". *Id.* at 112. In *Penix*, the Texarkana Court recognized the existence of a negligence action against a trustee notwithstanding the *Penix* plaintiff's failure to meet its evidentiary burden in support of such cause of action. *Penix*, 260 S.W. at 68. Thus, Texas courts recognize that someone owing a fiduciary duty also owes a duty of reasonable care. It stands to reason that the duty of reasonable care is not discarded simply because of the existence of a fiduciary duty.

The two duties are not mutually exclusive. Simply put, the existence of a fiduciary duty does not preclude an action based on negligence.

Furthermore, although the district court did not apply the discretionary function exception to Mrs. Mafrige's negligent leasing claim, such claim is not barred by the discretionary function exception to the FTCA for the same reasons that it does not apply to Mrs. Mafrige's breach of fiduciary duty claim, *see supra pp. 11-20.*

CONCLUSION

For the reasons stated above, this Court should grant Mrs. Mafrige's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Ricardo E. Morales
Counsel of Record
Richard G. Morales, Jr.
Baldemar Garcia, Jr.
Person, Whitworth, Ramos,
Borchers & Morales, L.L.P.
602 E. Calton Road
Laredo, Texas 78041
(956) 727-4441
Attorneys for Petitioner

December 30, 1999.

APPENDIX

FILED
JUN 23, 1999

THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-41358

CAROLYN H. MAFRIGE,

Plaintiff – Appellant,

VERSUS

UNITED STATES OF AMERICA; ET AL,

Defendants,

UNITED STATES OF AMERICA,

Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(L-91-CV-95)

Before HIGGINBOTHAM, BENAVIDES and DENNIS,
Circuit Judges.

PERCURIAM:

Carolyn Mafrige, plaintiff-appellant, appeals from the district court's dismissal of her appeal because it lacked subject matter jurisdiction over her Federal Tort Claims Act (FTCA) claim. See 28 U.S.C. § 2674. The Bureau of Reclamation, an agency of the U.S. Department of the Interior, purchased a tract of land from Mafrige and her mother, who retained a nonparticipating royalty interest in the property. Mafrige argues that the government breached its fiduciary duty by obtaining a 1/8 royalty for a mineral lease when leases on neighboring property were paying as much as 1/4 royalty. The district court ruled that the discretionary function exception barred Mafrige's FTCA claim because of the 1) discretionary nature of the government's decision in awarding mineral leases of federal lands and 2) public policy concerns underlying the government's management of federal mineral interests.

We have reviewed the record and the parties' briefs and AFFIRM the district court's judgment for essentially the same reasons set forth in its memorandum order dated August 12, 1996.

FILED
JUL 6 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CAROLYN H. MAFRIGE,	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO.**
	§	**L-91-95**
UNITED STATES OF	§	
AMERICA AND LOUIS	§	
DREYFUS NATURAL	§	
GAS CORP.,	§	
Defendants.	§	

MEMORANDUM AND ORDER

This quiet title action involves a dispute over the ownership interest of Carolyn H. Mafrige, the United States of America, and Louis Dreyfus Natural Gas Corp. in the mineral rights to land deeded by Mafrige to the United States. Pending are the United States' motions to dismiss Mafrige's complaint and to dismiss Louis Dreyfus' cross-complaint. Also pending are Mafrige's motions for partial summary judgment and for payment of royalties into the Court's registry.

Background

In February of 1978, the U.S. Department of the Interior (DOI) determined it required land owned by Carolyn H. Mafrige and her mother, Edna Gibbens Henry, for its "Nueces River Project" in McMullen County, Texas. The United States Government then negotiated with Mafrige and

Henry for the sale of 365.41 acres of their property in McMullen County. The parties signed the land purchase contract on May 23, 1979. The contract called for sale to the United States subject to interests reserved to the vendors. It states in part:

> This contract, and subsequent conveyance, is made subject to the following reservations:
>
> (1) All of the Vendor's non-participating royalty interest in and to oil, gas and other mineral interest in and under the property described in;
>
> (2) The Right of Vendor, herein, to receive royalty and/or rent payments from all existing oil, gas, and other mineral leases until such leases expire by their own terms.

U.S. Department of the Interior; Bureau of Reclamation, Contract No. 9-07-5B-L0642. Although the Government concedes it drafted the contract, it maintains Mafrige was represented throughout the negotiations by her husband, Stevens Mafrige, an attorney licensed by the State Bar of Texas.

In June 7, 1979 letter to Henry, Ronald W. Mills, Acting Project Construction Engineer for the Bureau of Reclamation (BOR) confirmed that the purchase contract contemplated the vendors' reserving their royalty interests. "The contract clearly indicates that you, along with your daughter, reserved all your nonparticipating royalty interest. This insures your right to derive all benefits from this nonparticipating royalty interest. The United States is obtaining no interest in this nonparticipating royalty." Ex. I, Plf. Mafrige's Mot. For Partial Summ. J., Apr. 28, 1993. The Bureau of Reclamation reconfirmed this arrangement in a

July 2, 1979 letter to Henry from Project Construction Engineer Allen C. Gates. That letter states the following:

> In the Land Purchase Contract between you and the United States, and the subsequent Warranty Deed to the United States, you are retaining all your nonparticipating royalty interest in the property conveyed to the Government. It is the policy of this agency, as well as the United States, to lease property for oil and gas exploration and development. It is also a policy of the United States that, when a lease is negotiated, it will be for no less consideration (bonuses, delay rentals, and royalties) than the consideration of other similar leases on adjoining property. With this in mind, when the Government would negotiate a lease for the property you are conveying to the United States, the royalty would be no less than similar leases on the adjacent and adjoining property not owned by the Government

Ex. J, Plf. Mafrige's Mot. For Partial Summ. J., Apr. 28, 1993 (emphasis added).

The warranty deed, drafted by the Government and executed on July 4, 1979, differed from the purchase contract in one significant respect. Instead of stating that the conveyance was "subject to the following reservations," it merely stated:

> This conveyance is subject to the following:
>
> . . .

> (2) Outstanding oil, gas, and other mineral interests, including leases, outstanding in the public or third parties.
>
> (3) All of the Grantors' non-participating royalty interests in and to oil, gas and other mineral interests in and under the property described herein.
>
> (4) The right of Grantors, herein, to receive royalty and/or rent payments from all existing oil, gas, and other mineral leases until such leases expire by their own terms.
>
> (5) RESERVING, to the Grantors, their heirs and assigns the non-exclusive right of ingress and egress . . . for domestic, and livestock uses . . . .

Vol. 167, pg. 52 of Deed Records of McMullen County, Texas.

At the time of the conveyance, no leases burdened the mineral fee. The only outstanding interest in the property was a 1/32 nonparticipating term royalty interest (NPTRI), reserved by Mary, Adele, and Brookes Henderson in a warranty deed to Carl Poenisch dated October 10, 1941, in "all oil, gas and other minerals produced for a term of fifty years from January 25, 1946 and so long thereafter as there is production."

Mafrige contends that, at the time of the conveyance, the parties intended the deed to convey only the surface estate and the executive interest in the mineral estate - - i.e., the right to lease the mineral fee and the right to receive all bonuses and delay rentals. If the Government were to lease the mineral estate in the future, Mafrige would receive all

royalty payments—except those due on outstanding mineral or royalty interests.

The BOR shared this view at least as late as February 23, 1989, when it responded to the Bureau of Land Management's (BLM) inquiry regarding the United States' interest in the mineral fee under the land deeded by Henry and Mafrige. "[O]ur records indicate that a commitment can be made regarding a stipulation of interests whereby the United States owns the fee surface and the executory mineral rights with the nonparticipating royalty owners receiving all of the leasehold royalty. All of the royalty (8/8) belong to the XKY owners and applicants."

As the BOR memorandum suggests, the Government and Mafrige did not dispute their respective rights in the mineral fee under the acreage for over ten years after the execution of the deed. Then on September, 6, 1988, pursuant to the Mineral Leasing Act of 1920, 30 U.SC. §§ 181 et seq., and the Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C §§ 351 et seq., the BLM leased the oil, gas, and other minerals under 273.91 acres of this land to the Royal Oil & Gas Co. (Lease No. TX NM 77169).

The standardized DOI lease form, which incorporates the provisions of the Mineral Leasing Acts, granted the lessee "the exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas (except helium)" in the subject lands. In return, Section One of the lease sets the annual rental fee at $1.50 per acre during the first five years of the lease. The rate would then rise to $2.00 per acre per annum for the duration of the lease. Section Two directs the lessee to pay a twelve and one-half percent ($1/8^{th}$) royalty interest. The rentals and royalties were to be paid "to the proper office of the lessor." The lease does not indicate whether the $1/8^{th}$ royalty was to be reduced by the 1/32 NPTRI reserved by the Hendersons in 1941, or whether the lessee must pay the

Hendersons out of its own share. Nor does the lease mention any interest purportedly reserved by Mafrige.

Mafrige found the lease to Royal unacceptable. Her husband wrote a letter to the BLM on April 14, 1989 complaining of the 1/8th royalty. Because other lessors in the vicinity had obtained royalties as high as 3/16ths and 1/4th, Mafrige urged the BLM to resubmit the lease for bids. The BLM refused to do so. The Mafriges then retained counsel to pursue a claim under the Federal Tort Claims Act for breach of the duty of utmost good faith. A June 19, 1990 letter from Mafrige's attorney to the BLM demanded that Government pay Mafrige $681,563.87 in "lost royalties." The Mafriges amended their demand to $1,899,129.82 in another letter to the BLM dated July 18, 1990.

In the meantime, Royal commenced exploration, drilling two producing wells by the fall of 1989. Royal paid the 1/8 royalty, reduced by the Hendersons' 1/32nd NPTRI, to Mafrige, even though the lease directed the payments to be made to the Government. The Government did not contest these payments for almost a year. Then, on February 14, 1990, the Field Solicitor's office of the DOI sent a memorandum to the BLM rejecting the view taken by the BOR. It stated that the DOI now believed the United States was entitled to a royalty of one-eighth of all oil and gas produced from the leased lands and that Mafrige was entitled to nothing. The Government also maintained the Hendersons' interest should not be deducted from its royalty interest, but rather should be taken from the lessee's 7/8th share.

Royal Oil & Gas Co. subsequently assigned the lease, with the necessary approval of the Secretary of the Interior, to DeKalb Energy Texas, Inc. on August 1, 1980. Upon assignment, DeKalb continued paying Mafrige royalty payments under the lease. Soon thereafter, however, the Government reasserted the position taken in the February 14,

1990 memorandum. The Mineral Management Service of the Department of the Interior (MMS) verbally notified DeKalb that it claimed the right to a 1/8th royalty interest free and clear of the 1/32nd nonparticipating term royalty interest reserved by the Hendersons in 1946. The Government reiterated this position once again when the MMS sent a letter to DeKalb inquiring whether any funds were being held in an escrow account on behalf of the United States.

DeKalb brought suit against the United States in this Court on September 25, 1991 under the Quiet Title Act, 28 U.S.C. §§ 1346(f) and 2409(a). DeKalb seeks to quiet title in its favor in a "7/8 leasehold" (the right to 7/8ths of production) created by the September 6, 1988 lease and the August 1, 1990 assignment. The Government counterclaimed, alleging DeKalb had refused to pay the United States the 1/8th royalty it owned. It demanded DeKalb account for 1/8th of production from the lease and pay damages for the amounts due.

DeKalb then joined Mafrige as a defendant and informed her that it was suspending all royalty payments to her pending the outcome of the litigation. Mafrige answered that the United States owned no interest in the mineral fee other than the executive interest and that she was entitled to all royalties from the Royal/DeKalb lease. She also cross-claimed against the United States under four theories: (1) "concealment, continuing conduct, and reformation"; (2) quiet title; (3) negligence; (4) and breach of fiduciary duty or duty of utmost good faith.

On August 11, 1992, the Court realigned the parties so that Mrs. Mafrige became the plaintiff, DeKalb became a defendant, and the United States remained a defendant. Mrs. Mafrige's first amended cross-claim against the United States became her complaint, and DeKalb's first amended complaint became its cross-claim. The United States'

counterclaim against DeKalb became its cross-claim. On March 9, 1993, the Court granted an unopposed motion substituting Louis Dreyfus Natural Gas Corp. for DeKalb as a defendant.

DISCUSSION

I. United States' Motion to Dismiss Louis Dreyfus Natural Gas Corp.'s Cross-complaint.

The United States moves to dismiss Dreyfus' cross-claim to quiet title to a 7/8th mineral leasehold in the subject lands on two grounds. The Government first argues the cross-claim must be dismissed under Fed. R. Civ. P. 12(b)(6) because it does not state a claim for relief under the Quiet Title Act, 28 U.S.C. § 2409a. Alternatively, the Government maintains the cross-claim must be dismissed as premature because Dreyfus or its predecessor in interest never afforded the DOI an opportunity to formally construe the lease and make a decision as to the amount of royalty due the Government.

A. Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6).

The Government contends Dreyfus' claim is not cognizable under the Quiet Title Act, 28 U.SC. § 2409a. Section 2409a(a) states that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest . . . ." "Disputed title" under this section means disputed ownership. Landow v. Carmen, 555 F. Supp. 195, 196 (D. Md. 1983)

The Government seized upon the language "disputed title to real property" to challenge the validity of Dreyfus' claim. It argues a federal oil and gas lease does not convey an ownership interest in real property. The lease merely

gives the lessee a contractual right to explore for and develop the mineral rights. Therefore, Dreyfus acquired no ownership interest in real property. Because Dreyfus can claim no property interest, there can be no "disputed title to real property." The only dispute at issue here, the Government concludes, involves the construction of the terms of a lease - -which is not cognizable under the Quiet Title Act.

This Court must determine whether a federal oil and gas lease issued under the Mineral Leasing Act for Acquired Lands of 1947 conveys an ownership interest in real property for purposes of § 2409a(a). Federal law controls. E.g., Vincent Murphy Chevrolet Co., Inc. v. United States, 766 F.2d 449, 451 (10th Cir. 1985) (stating the interpretation of the Quiet Title Act is a matter of federal law); Fulcher v. United States, 696 F.2d 1073, 1076 (4th Cir. 1982) (same). The question may be divided into two parts: (1) whether oil, gas, and other mineral deposits constitute real property under §2409a(a), and if so, (2) whether a federal mineral lease conveys an ownership interest in those minerals.

The first issue is easily resolved. Courts have heard cases under § 2409a(a) where only mineral interests are in dispute. E.g., Amoco Production Co. v. United States, 663 F. Supp. 998, 999 (D. Utah 1987); KN Energy v. Marathon Oil Co., 1983 WL 1430 (D. Neb.) The legislative history to the Quiet Title Act indicates Congress intended for the Act to create jurisdiction for disputes involving only the title to minerals. "The quieting of title where the plaintiff claims an estate less than a fee simple - - an easement or the title to minerals - - is likewise included in the terms of the proposed statute." H.R. Rep. No. 92-1559, 92d Cong., 2d Sess., reprinted in 1972 U.S.S.C.A.N. 4552, 4554 (emphasis added). Mineral deposits therefore fall within § 2409a(a)'s definition of real property.

Whether a federal lease conveys title or ownership in those minerals for purposes of §2409a(a) is a more difficult issue. In the absence of federal precedent, this Court may consult state property law if that law is not hostile to federal interests. See, e.g., Reconstruction Fin. Corp. v. Beaver County, 66 S.Ct. 992, 995 (1946) (using state law to define "real property" under § 10 of the Reconstruction Finance Corp. Act since "the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act"). Indeed, courts have repeatedly used state law in developing standards under the Quiet Title Act. See Vincent Murphy Chevrolet Co., Inc., 766 F.2d at 451 (stating that state law may be invoked in the application of language of the QTA to specific facts); Fulcher, 696 F.2d at 1076 (same); K.N. Energy, 1983 W.L. 1430 (using Nebraska law to determine whether natural gas that had escaped from an underground reservoir was "real property" under QTA). Accordingly, the Court turns to Texas law.

Texas courts have long held that oil and gas leases convey interests in real property. E.g., REO Industries v. Natural Gas Pipeline Co., 932 F.2d 447 (5th Cir. 1991). The Texas Supreme Court recognized in 1917 that oil and gas deposits "lie within the strata of the earth, and necessarily are a part of the realty. Being a part of the realty while in place, it would seem to logically follow that, whenever they are conveyed while in that condition or possessing that status, a conveyance of an interest in realty results." Texas Co. v. Daugherty, 176 S.W. 717, 719 (Tex. 1915)

The Daugherty court concluded that an oil and gas lease invests the lessee and his assigns with title to the oil and gas deposits. Id. At 718-19. The court elaborated on the nature of this interest several years later in Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923). It stated that oil and gas leases create determinable fees, "leaving in the grantors, their heirs or assigns, the possibility

of reacquiring the absolute fee-simple titles, less whatever minerals may be meantime produced and marketed." Id. at 295.

The Government argues that Daugherty and its progeny cannot be used to develop the federal standard here because they conflict with federal case law interpreting the Mineral Leasing Act. It directs the Court's attention to Boesche v. Udall, 83 S.Ct. 1373 (1963). The Supreme Court held in Boesche that the Secretary of the Interior maintains significant control over federal oil and gas lessees, including the right to cancel a lease issued by his Department in violation of the Mineral Leasing Act. 83 S.Ct. at 1367-77. The Government points to language in Boesche that the lease "does not give the lessee anything approaching the full ownership of a fee patentee" or "an unencumbered estate in the minerals," Id. at 1377.

This language does not mean that a federal oil and gas lease vests no property interest in the lessee. On the contrary, in framing the issue in Boesche, the Court referred to a federal oil and gas lease as a conveyance. "We think that no matter how the interest conveyed is denominated the true line of demarcation is whether as a result of the transaction 'all authority or control' over the lands has passed from 'the Executive Department'. . . ." Id (citations omitted) (emphasis added). As the Ninth Circuit noted in Morton v. United States, 512 F.2d 743 (9th Cir. 1975), applying Boesche to Outer Continental Shelf Lands Act leases, the "lease does convey a property interest enforceable against the Government, of course, but it is one lacking many of the attributes of private property." Id. at 747.

That a lease conveys only a "property interest" in the minerals, and not complete ownership, is inconsequential under § 2409a(a). A party need only claim some ownership interest in the property to create a "disputed title to real property." See Werner v. United States, 9 F.3d 1514, 1516

(11th Cir. 1993) (QTA action in which plaintiff claimed only an easement by necessity); Shultz v. Department of Army, 886 F.2d 1157, 1159 (9th Cir. 1989) (QTA action in which plaintiff claimed only a right-of-access over U.S. military installation). Consequently, the Court holds that an oil and gas lease under the Mineral Leasing Act for Acquired Lands creates an interest in real property for the purposes of the Quiet Title Act. The Government's first ground for dismissing Dreyfus' claim fails.

B. Failure to File Administrative Claim.

The Government also argues Dreyfus' action should be dismissed because the oil company failed to exhaust, or even resort to, available administrative remedies before seeking relief in this Court. Regulations implementing the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands of 1947 provide a detailed process for dealing with various types of complaints by federal lessees. The Government points specifically to 43 C.F.R. § 3165.1-1, which states that petitions for the modification of royalty or rental requirements must be filed with the Minerals Management Service. It also cites 30 C.F.R. part 290 for the right to appeal the decision of the MMS officer hearing the case to the Director of the MMS, and 43 C.F.R. part four for the right of further appeal to the Interior Board of Land Appeals. Only after the exhaustion of administrative appeals may claims within the jurisdiction of the MMS or the DOI be brought into U.S. District Court through the Administrative Procedures Act. Myers v. Bethlehem Shipbuilding Corp., 58 S.Ct 459, 463-64 (1938); Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974).

The Government contends a federal oil and gas lessee disagreeing with the Minerals Management Service's interpretation of its rights under the lease must avail itself of this administrative procedure. It relies on a series of cases,

all of which are inapposite. See Mesa Operating Ltd. v. Dept. of the Interior, 931 F.2d 318 (5th Cir. 1991), cert. denied, 112 S.Ct. 934 (1992); Hoover & Bracken Energies, Inc. v. United States Dept. of the Interior, 723 F.2d 1488 (10th Cir. 1983), cert. denied, 105 S.Ct. 93 (1984). The issue in these cases was how to calculate the value of the minerals produced under the lease, which in turn affected the amount of royalties paid.

The instant case is different. It involves a dispute regarding ownership interests in a mineral estate. Dreyfus claims it owns a full 7/8th leasehold while the Government maintains Dreyfus' owns a 7/8th leasehold reduced by the term royalty interest reserved by the Henderson family in 1946. In short, this case is a quiet title action, and the Quiet Title Act represents the exclusive means of challenging United States tittles. Block v. North Dakota, 103 S.Ct. 1811, 1818-19 (1983). Administrative appeals and judicial appeals under the Administrative Procedures Act are not available where the Quiet Title Act applies. McIntyre v. United States, 789 F.2d 1408, 1410 (9th Cir. 1986). Because this Court possessed subject matter jurisdiction over this action, the Government's motion to dismiss under Fed. R. Civ. P. 12(b)(1) is **DENIED**.

II. United States' Motion to Dismiss Mafrige's Amended Complaint.

Mafrige's amended complaint includes four claims: (1) "concealment, continuing conduct, and reformation"; (2) quiet title; (3) negligence; and (4) breach of fiduciary duty/duty of utmost good faith. The Government moves to dismiss each on separate grounds.

A. Reformation of Deed.

The Government interprets Mafrige's cause of action for "concealment, continuing conduct and reformation" as two separate claims: one for concealment and continuing conduct and another for reformation of the deed based upon mutual mistake. The Court interprets the pleadings only to state a claim for reformation of the deed based upon mutual mistake. Mafrige appears to have referred to concealment and continuing conduct only to suggest that she could not have known of the Government's claim at the time of the execution of the deed, thereby anticipating a statute of limitations defense.

The Government contends that the Quiet Title Act does not provide this Court with subject-matter jurisdiction to reform a deed. Mafrige responds that she does not seek to reform the deed under this Act. See Carolyn H. Mafrige's Resp. to the Court's November 15, 1994 Order, pp. 3 (stating "[t]he First Amended Cross-claim clearly and unequivocally reveals that Mafrige does not seek to reform the subject 1979 Warranty Deed pursuant to the Quiet Title Act"). Rather, she seeks reformation based upon mutual mistake as a state-law claim under the Court's supplemental jurisdiction. 28 U.S.C. § 1367.

Mafrige's argument ignore the critical fact that the United States of America is a sovereign. Absent and express waiver by statute, it is immune from suit. F.D.I.C. v. Meyer, 114 S.Ct. 996, 1000 (1994). Supplemental jurisdiction generally allows a federal court with jurisdiction over a claim to hear a pendent state claim which it could not otherwise hear, but the doctrine presupposes that a valid state claim exists. There can be no valid state claim against the federal sovereign unless it has expressly consented to such a claim. There is no indication of consent here. This Court lacks subject-matter jurisdiction over Mafrige's reformation claim,

and the Government motion to dismiss that claim is GRANTED. Mafrige's motion for partial summary judgment on her reformation claim is DENIED as moot.

B. Quiet Title Action.

The Government moves to dismiss Mafrige's claim to quiet title as time-barred under the twelve-year statute of limitations in 28 U.S.C. 2409a(g). Because the statute of limitations defense is jurisdictional in suits against the United States, Block, 103 S.Ct. at 282-83; Shultz v. Department of the Army, 10 F.3d 649, 668 (9th Cir. 1993), the Court construes the motion as one brought under Fed. R. Civ. P. 12(b)(1). See Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 766 (4th Cir. 1991) (affirming district court's dismissal of plaintiff's Quiet Title action under Fed. R. Civ. P. 12(b)(1) for failure to bring the action within the twelve-year limitations period), cert. denied, 112 S.Ct. 1667 (1992).

In ruling on a Rule 12(b)(1) motion where, as here, the defendant attacks the factual basis for jurisdiction, the Court may hear evidence regarding jurisdiction and to rule on that issue prior to trial. Williamson v. Tucker, 645 F.2d 404, 412-14 (5th Cir.), cert. denied, 102 S.Ct. 396 (1981); Augustine v. United States, 704 F.2d 1074, 1076 (9th Cir. 1983); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 892 (3d Cir. 1977). "No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Thornhill Publishing Co. v. General Tel. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

A suit under the Quiet Title Act is barred unless it is commenced within twelve years of the date upon which it accrues. 28 U.S.C. 2409a(g). "Such an action shall be

deemed to have acrrued on the date that the plaintiff or his predecessor knew or should have known of the claim of the United States." 28 U.S.C. § 2409(f). The test is one of reasonableness. "All that is necessary is a reasonable awareness that the government claims some interest adverse to the plaintiffs." Knapp v. United States, 636 F.2d 279, 283 (10th Cir. 1980).

The Government insists that Mafrige should have known of the Government's claim to a royalty interest on July 4, 1979, the date of the execution of the deed, because the language of the deed itself makes clear that Mafrige did not reserve a royalty interest. Although the construction of a deed to which the United States is a party is a question of federal law, Texas law may be adopted as the federal standard where that law is not contrary to federal interests. See United States v. Little Lake Misere Land Co., 93 S.Ct. 2389, 2398 (1973); Clearfield Trust Co. v. United States, 63 S.Ct. 573, 575 (1943). Here the parties seem to agree that Texas rules of contract interpretation furnish the appropriate standard.

Unlike the land purchase contract, which made the conveyance "subject to the following reservations . . . ," the deed stated only that the conveyance was "subject to the following: . . . (3) all of the grantors' nonparticipating royalty interest . . . ." The Government claims that this language is not an express reservation of a royalty interest to the grantors but was only a limitation on their warranty. Ladd v. DuBose, 344 S.W.2d 476, 479 (Tex. Civ. App. - - Amarillo 1961, no writ).

As further proof that the deed does not reserve a royalty interest, the Government points to clause five of the "subject to" paragraph. "This conveyance is subject to the following: . . . (5) RESERVING to the grantors, their heirs and assigns the nonexclusive right of ingress and egress . . .

for domestic, and livestock uses . . . ." Had the parties intended the grantors to reserve a royalty interest in clause three, the argument goes, they would have stated so explicitly, just as they did with the right of ingress and egress in clause five.

The Government's argument is unpersuasive. Texas courts have held that "subject to" is a term of qualification, meaning "subordinate to," "subservient to," or "limited by." Kokernot v. Caldwell, 231 S.W.2d 528, 531 (Tex. Civ. App. - - Dallas 1950, writ ref'd n.r.e.). It can limit the estate granted, the estate warranted, or both, depending on the intent of the parties. Bass v. Harper, 441 S.W.2d 825, 827 (Tex. 1969). In Bass, the Court rejected the defendant's argument that the relevant "subject to" provision referred only to the warranty, reasoning that "[t]he instrument in question [did] not relate the outstanding mineral royalty interests to the warranty. It could have done so, but it is tied specifically to the grant. The Grant, not the Warranty, is made subject to outstanding interests." Id. The same holds true here, as that warranty provision is found in a separate section of the deed. With respect to the clause reserving the right ingress and egress, it is taken verbatim from the purchase contract, which also contained language expressly reserving the vendors' non-participating royalty interest.

Moreover, other evidence demonstrates that the parties intended for the conveyance to reserve to Mafrige and Henry all royalties from future leases. First, the land purchase contract, which expressly reserves a royalty interest to Mafrige, anticipates the execution of a deed with an identical reservation. Second, the letters that the BOR sent Henry in the months leading up to the execution of the deed confirm that the conveyance to the United States would not include any royalty interest. See pp. 2-3 supra.

Finally, the Government acknowledged Mafrige's royalty interest for years after the execution of the deed. In

response to the BLM's inquiry on the United States' interest under the September 1988 lease, the BOR stated that "[t]he United States should receive payment for only the lease bonus and any delay rentals. All of the royalty (8/8) belongs to the NPRI owners and applicants. The United States does not own any royalty interest and thereby is not entitled to receive any royalty payments." While the BLM ultimately rejected Reclamation's position, it did not initially challenge the royalty payments made to Mafrige. Royal drilled two producing wells in the fall of 1989 and began making royalty payments to Mafrige. Yet, the MMS did not demand royalties for the United States until 1991. DeKalb did not discontinue making its royalty payments to Mafrige until early 1992, when Mafrige claims she first learned of the United States' claim to royalties.

While the ultimate meaning of the 1979 deed must yet be determined, Mafrige did not have constructive notice of the Government's adverse position for several years after the execution of the deed. She field this quiet title action well within the twelve-year limitations period.

The Government proffers a second ground for dismissing Mafrige's claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. It argues that the deed could not have reserved a royalty interest on Mafrige's behalf because of the Mineral Leasing Act for Acquired Lands mandates that all royalties from oil and gas produced on acquired lands be paid into the U.S. Treasury. It notes that the "laws in force at the time and place of the making of a contract, and which affect its validity, performance, and enforcement, enter into and form part of it, as if they were expressly referred to or incorporated in its terms." Northern Pacific Ry. Co. v. Wall, 36 S.Ct. 493, 495 (1916). "Therefore, the true agreement of the parties must be deemed to have included a stipulation that all of the royalties derived from future leases would be paid into the United States Treasury, 30 U.S.C. § 191, 355, and

that any future leases would provide for the payment of a royalty of at least 12.5 percent to the United States. See 30 U.S.C. § 226; 43 C.F.R. § 1810.3." United States' Resp. to Carolyn Mafrige's Mot. For Partial Summ. J., Apr. 28, 1993, p.l.

The Government's position fails to consider another provision of the Act, 30 U.S.C.§ 354. That section states that "[w]here the United States does not own all of the mineral deposits under any lands sought to be leased and which are affected by this chapter, the Secretary is authorized to lease the interest of the United States in any such mineral deposits . . . ." This provision implies that the Government does not always own all of the minerals under the lands it may lease. It follows as a matter of common sense that the Government has no right to collect and keep royalties on minerals it does not own. Sections 191, 355, and 226 are not inconsistent with Mafrige's claim that she reserved a nonparticipating royalty interest. The Government's motion to dismiss Mafrige's quiet title claim is **DENIED**.

C. Negligence Claims.

Mafrige's amended complaint outlines two causes of action for negligence under the Federal Tort Claims Act (FTCA). First, she claims that the Government did not exercise reasonable care in preparing the deed. This resulted in the execution of a deed that failed to expressly reserve to the grantors the right to all royalties from future leases. Second, Mafrige alleges that the Government, as holder of the executive interest, breached its duty to the nonparticipating royalty interest holders to lease the minerals for the highest royalty possible. See Def./Cross-claimant Carolyn H. Mafrige's First Am. Answer and Cross-cl, July 9, 1992, pp. 15-16. Under the FTCA, the government is liable "in the same manner and to the same extent as a private person under like circumstances." 28 U.S.C. § 2674. In

making this determination, the Court must look to "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

Mafrige concedes that the purchaser in an arms-length real estate transaction is not normally under an obligation to use reasonable care in safeguarding the interests of the seller, but contends that the Government assumed such a duty in this case by drafting the July 4, 1979 deed. She refers to the "Good Samaritan" doctrine which provides that "one who voluntarily undertakes an affirmative course of action for the benefit of another has a duty to exercise reasonable care that the other's person or property will not be injured thereby." Colonial Sav. Ass'n v. Taylor, 544 S.W.2d 116, 119 (Tex. 1976).

Courts emphasize that the doctrine applies only when the party undertaking the voluntary course of action does so for the benefit of the other party. Philadelphia Mfrs. Mut. Ins. Co. v. Gulf Forge Co., 555 F.Supp. 519, 526 (S.D. Tex. 1982); Colonial Sav. Ass'n, 544 S.W.2d at 119; Peterson v. Mutual Sav. Inst., 646 S.W.2d 327, 329 (Tex. App. - - Austin 1983, no writ). The Government drafted the deed to consummate the purchase of Mafrige's land. Any incidental benefits that Mafrige might have derived from this do not satisfy the requirement that the Government's action be for Mafrige's benefit. Philadelphia Mfrs., 555 F.Supp. at 526. Imposing a duty on the Government under these circumstances would be an unwarranted and imprudent extension of the "Good Samaritan" doctrine. Because Mafrige points to no credible authority that Texas law would impose liability on a private party under similar circumstances, the Government's motion to dismiss Mafrige's claim for negligent drafting of the July 4, 1979 deed is **GRANTED**.

Mafrige's claim for negligent leasing also lacks merit. Under Texas law, an executive interest holder's failure to

obtain for his royalty interest owners the highest royalty possible does not sound in simple negligence. It is considered, depending on the circumstances, a breach of a fiduciary duty or of a duty of utmost good faith. See Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984). These duties impose higher standards on the executive than the duty of reasonable care associated with negligence law. As discussed below, Mafrige has brought a claim for breach of a fiduciary duty or duty of utmost good faith. Accordingly, the Court **GRANTS** the Government's motion to dismiss Mafrige's claim for negligent leasing.

D. Breach of Fiduciary Duty or Duty of Utmost Good Faith.

The Government moves to dismiss Mafrige's claim for breach of a fiduciary duty or a duty of utmost good faith on two grounds: (1) that the claim sounds in contract, not in tort, and must be filed in the Court of Claims; and that (2) the Bureau of Reclamation employees who drafted and approved the land purchase contract and deed lacked the statutory authority to bind the United States into a "special relationship" with Mafrige.

Texas courts have long held that the executive interest owner owes the nonparticipating royalty interest owners a duty of "utmost good faith" when leasing the mineral fee. See Ernest Smith, Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right, 64 Tex. L. Rev. 371 (1985). It was not until Manges v. Guerra, 673 S.W.2d at 183, that the Texas Supreme Court equated this duty with a fiduciary obligation. There Manges owned one-half mineral interest in the Guerra ranch plus the executive interest to the other half interest. The Court held that, under the circumstances, Manges owed the Guerras a fiduciary duty, which he breached by leasing the entire fee to himself for a nominal bonus and by otherwise "dealing with the

entire mineral interest so that he received benefits the nonexecutives did not receive." Id. at 184.

In the wake of Manges, the lower Texas courts have also found a fiduciary obligation whenever the amounts due on the nonparticipating royalty interest are linked to the royalty negotiated by the holder of the executive interest. This is true in cases, such as this one, where the nonparticipating royalty interest are not fixed by deed (e.g., $1/8^{th}$ royalty or $1/4^{th}$ royalty). See Dearing, Inc. v. Spiller, 824 S.W.2d 728, 732-33 (Tex. App. - - Fort Worth 1992, writ denied); Mims v. Beall, 810 S.W.2d 876, 879 (Tex. App. - - Texarkana 1991, no writ); Comanche Land & Cattle Co., Inc. v. Adams, 688 S.W.2d 914 (Tex. App. - - Eastland, no writ). Because this duty "arises from the relationship of the parties and not from the express or implied terms of the deed," Comanche Land & Cattle Co., Inc. v. Adams, 688 S.W.2d 914, 915-16 (Tex. App. - - Eastland 1985, no writ) (quoting Manges, 673 S.W.2d at 183), a breach sounds in tort and is properly before this Court under the FTCA.

The Government nevertheless contends that it cannot be liable for breach of a fiduciary duty or duty of utmost good faith because the Bureau of Reclamation officers that drafted and approved the deed lacked the authority to enter the United States into such a "special relationship." In fact, the Government continues, an agreement by which the Government leases a mineral fee for the benefit of a private party violates the Mineral Leasing Act for Acquired Lands, which prohibits the Secretary of the Interior from leasing minerals owned by third-parties, 30 U.S.C. § 355, and requires that all royalties and other payments derived from leases under the Act be paid into the U.S. Treasury.

This argument is unpersuasive. The Mafrige property was purchased under the Reclamation Act, 43 U.S.C. § 371 et seq., which affords the Secretary of the Interior

considerable discretion in acquiring real estate for federal reclamation projects.

> Where, in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for the purpose.

43 U.S.C. § 421 (emphasis added). Because there can be no doubt that this section gives the Secretary the authority to purchase an executive interest, i.e., the right to lease the mineral fee, or any other right needed to complete a reclamation project, it must also be deemed to give the Secretary authority to assume any duties that correspond to the right acquired. In this case, the executive right carries with it the concomitant duty to lease the mineral fee for the benefit of nonparticipating royalty interest owners.

The Government essentially maintains - - without citing any persuasive authority - - that the Secretary cannot acquire for a reclamation project any right that carries with it a corresponding duty. Under this view, the Secretary could be forced to purchase complete ownership in property when lesser interests would suffice to carry out the reclamation project. For example, in this case, if the reclamation project required only the acquisition of the surface and the right to control oil and gas exploration activities, it would not serve the public interest to force the BOR to purchase the entire mineral fee, possibly at a much higher cost, just to avoid the duty of utmost good faith to the royalty owner. The Government's motion to dismiss Mafrige's claim for breach of a fiduciary duty/duty of utmost good faith is **DENIED**. This ruling does not address the issue of whether this

particular tort falls within the discretionary function exception to the FTCA. See 28 U.SC. § 2680. Frankly, the Court considers the parties' briefing on the issue to be woefully inadequate. That issue shall remain for further consideration.

III. Plaintiff Mafrige's Motion for Defendant Dreyfus to Pay Royalties into Court's Registry.

Mafrige moves to have Dreyfus pay royalties to the Court's registry. Specifically Mafrige asks that Dreyfus deposit the following:

1. The entire amount heretofore placed in suspense by DeKalb and Dreyfus on account of the matters in controversy in this suit (On January 29, 1992, DeKalb Energy of Texas, Dreyfus' predecessor-in-interest, suspended royalty payments to Mafrige pending the outcome of this case); and

2. A monthly sum equivalent to the 1/8 royalty payable by the lessee under the terms of the oil and gas lease covering the land in controversy herein, less, the amount payable to the owners of the outstanding non-participating royalty interest of 1/32 of all oil, gas and other minerals produced from said land, reserved by Mary, Adele and Brookes Henderson in that certain warranty Deed to Carl Poenisch dated October 10, 1941, recorded in Volume 30, page 368 of the Deed Records of McMullen County, Texas.

Dreyfus agrees to this motion, and the Government does not object. Therefore, the Court **GRANTS** Mafrige's motion and directs Dreyfus to pay the amounts described above to the Clerk of this Court for deposit into the Registry.

Conclusion

1. The United States' motion to dismiss Louis Dreyfus Natural Gas Corp.'s cross-complaint is **DENIED**.

2. The United States motion to dismiss Carolyn H. Mafrige's amended complaint is **GRANTED** as to Mafrige's reformation and negligence claims, but is **DENIED** as to Mafrige's quiet title and breach of fiduciary duty/duty of utmost good faith claims.

3. Carolyn H. Mafrige's motion for partial summary judgment on her reformation claim is **DENIED** as moot.

4. Carolyn H. Mafrige's motion to have royalties deposited into the registry of the Court is **GRANTED**.

5. The case will proceed to trial on Dreyfus' and Mafrige's quiet title claims and Mafrige's claim for breach of the duty of utmost good faith. The parties are **ORDERED** to confer immediately to discuss what must be done to have theses issues ready for trial and when those matters can be concluded. They are further **ORDERED** to file a joint status report no later than July 12, 1995, advising of the results of their conference. The Court will then set this case for trial.

DONE at Laredo, Texas this 5th day of July, 1995.

_____

UNITED STATES DISTRICT JUDGE

FILED
AUG 12 1996

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

CAROLYN H. MAFRIGE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. L-91-95**
THE UNITED STATES	§	
OF AMERICA and LOUIS	§	
DREYFUS NAT. GAS	§	
CORP.,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending is Defendant United States of America's opposed motion under Fed. R. Civ. P. 12(b)(1) to dismiss Plaintiff Mafrige's claim for breach of a fiduciary duty or duty of utmost good faith (Docket No. 62). Plaintiff Mafrige has brought a claim under the Federal Tort Claims Act (FTCA), arguing that the United States, as holder of the executive interest in the mineral fee in question, breached its fiduciary duty or duty of utmost good faith when it executed a lease with Louis Dreyfus' predecessor-in-interest. (Docket No. 24 at pages 11-12). Specifically, Mafrige faults the Government for requiring the lessee to send all royalty payments to the Minerals Management Service (MMS) and for agreeing to a $1/8^{th}$ royalty, when lessees on comparable

leases allegedly were paying as much as 1/4th royalties. Finally, Mafrige argues that the placing of restrictions on the lessee's use of surface estate during drilling operations made the mineral estate less attractive to potential lessees.

THE FEDERAL TORT CLAIMS ACT

Under the FTCA, the Government waives its sovereign immunity from suit in tort for money damages. This waiver of sovereign immunity, however, is not absolute but rather is limited by Congress' intent. The limited nature of the waiver is evidenced by the several exceptions included in the statute. See 28 U.S.C. § 2680. The scope of the waiver must be determined by applying federal law because the exceptions "define the limits of federal subject matter jurisdiction in this area." Hydrogen Technology Corp. v. United States, 831 F.2d 1155, 1161 (1st Cir. 1987), cert. denied, 486 U.S. 1022 (1988); Dalehite v. United States, 73 S.Ct. 956, 962 (1953). If after applying federal law the Court determines that an exception to the waiver of immunity applies, the Court has no power to adjudicate the claim.

The Discretionary Function Exception

Under one such exception, the United States is not liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The Supreme Court has interpreted this language to contain two separate requirements. United States v. Gaubert, 111 S.Ct. 1267, 1273-74 (1991).

First, the conduct complained of must involve an element of "judgment or choice". Gaubert, 111 S.Ct. at 1273 (quoting Berkovitz v. United States, 108 S.Ct. 1954, 1958

(1988)). Second, because the purpose of the exception is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," the excepted discretionary acts must be based upon public policy. Guabert, 111 S.Ct. at 1273-74. Where "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." Id. at 1274.

As a preliminary observation, the Government now claims Mafrige has no royalty interest in the mineral estate, a contention which forms the basis of the quiet title claim in this case. Obviously, if the Government is correct, the FTCA claim is moot since Mafrige would have no interest whatsoever in the minerals. The Court will, therefore, discuss the FTCA claim on the assumption that Mafrige has a non-participating royalty interest. Under that assumption, the Government still has a recognized interest in the mineral estate, being the executive right holder, with the exclusive right to lease the mineral estate and to receive all bonuses and delay rentals.

The Mineral Leasing Act for Acquired Lands of 1947 applies to this mineral estate. See 30 U.S.C. § 352. This Act and related statutes describe a comprehensive scheme for leasing of federally owned or controlled minerals. In this case, the Government officials leased the mineral estate in exact compliance with the provisions of 30 U.S.C. § 226(b)(1) and the implementing regulations found in 43 CFR § 3100, et seq., particularly §§ 3103.3-1, et seq. Mafrige does not dispute this, but instead challenges the applicability of the regulations. She particularly observes that § 3103.3-1(a) refers to a "mineral interest owned by the United States," and suggests that the Government did not own any mineral

interest. In fact, however, the Government did own an interest in the mineral estate, albeit not a royalty interest. See Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 (Tex. 1990) ("the executive right is an interest in property, an incident and part of the mineral estate"); 8 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW 637 (1994) ("It is the attribute of operating rights that distinguishes a mineral interest from a royalty interest."). More importantly, as the executive right holder and as part of an overall statutory scheme for managing federal mineral interests, the Government clearly had discretion to determine the terms under which this mineral interest would be leased. Unquestionably, one could reasonably argue that § 3103.3-1 did not perfectly fit this situation, where the Government owned the executive right but perhaps no royalty interest. Nevertheless, even if the Government arguably abused its discretion by applying that regulation to this particular mineral estate, that abuse of discretion would not negate the fact that the decision itself was a discretionary one. Herein lies the problem for Mafrige. Were the defendant not the federal government, and Mafrige had filed a tort suit in state court, Mafrige could recover damages against the executive right holder for abusing the unquestionably broad discretion it has under the law. However, the federal government may dictate the conditions under which it is willing to be subjected to tort liability. In 28 U.S.C. § 2860(a), it has dictated that it is unwilling to be held liable when one of its agencies or employees abuses its discretion while performing a discretionary function.

As to the second Gaubert requirement, it is clear that public policy concerns underlie the Mineral Leasing Act of 1920. The statute provides a framework for administering the mineral interests of the United States. By expanding the Secretary of Interior's control over mineral interests, Congress intended to "promote the orderly development of the oil and gas deposits in the publicly owned lands of the

United State through private enterprise," Harvey v. Udall, 384 F.2d 883, 885 (10th Cir. 1967) (citation omitted), and to "obtain for the public reasonable financial returns on assets belonging to the public." Mountain States Legal Foundation v. Andrus, 499 F.Supp. 383, 392 (D. Wyo. 1980) (citation omitted). The legislative history of the act and its amendments also reflects an interest in increasing domestic reserves of oil and gas, which are "so necessary for our security in war and peace." S. REP. No. 1549, 86th Cong.. 2d Sess. 2 (1960), reprinted in 1960 U.S.C.C.A.N. 3313, 3314-15.

Because the Mineral Leasing Act and its implementing regulations give BLM employees discretion in awarding and administering oil and gas leases of federal lands, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." Gaubert, 111 S.Ct. at 1274; ALX EL Dorado, Inc. v. Southwest Sav. and Loan Ass'n, 36 F.3d 409, 412 (5th Cir. 1994). Mafrige bears the burden to "allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." Gaubert, 111S.Ct. at 1274-75; ALX EL Dorado, 36 F.3d at 412.

Mafrige argues that the BLM lease was not a matter of "government policy but rather an act encompassing an 'element of judgment' . . .not of the kind the discretionary function exception was designed to protect." (Docket No. 63 at page 7). According to Mafrige, whether the Government negotiated a 1/8th royalty or 1/4th royalty was not "a governmental act based on considerations of public policy nor is such an act a matter of national concern." (Docket No. 63 at page 7). Admittedly, the single decision to execute this lease at a 1/8th royalty was not a matter of national interest nor impact. Such an isolated analysis, however, "obscures the very purpose of the discretionary function exception."

Baldassaro v. United States, 64 F.3d 206, 211 (5th Cir. 1995) ("any exercise of government discretion could be overly parsed . . . to the point that any relationship to policy would appear too attenuated"), cert. denied, 116 S.Ct. 1823 (1996). Indeed, focusing upon single acts or decisions undertaken in furtherance of broad public policies "would render the discretionary function exception nugatory and open virtually every decision that implements a governmental policy to liability under some waiver of sovereign immunity." Id. at 212. Mafrige has presented insufficient facts to rebut the presumption that the Government's conduct with respect to this lease was in accordance with the public policy considerations underlying the Mineral Leasing Act. The discretionary function exception therefore bars Mafrige's FTCA claims.

ORDER

Accordingly, Defendant United States of America's Rule 12(b)(1) Motion to Dismiss is **GRANTED** and Plaintiff Mafrige's FTCA claim is **DISMISSED**. The parties are directed to confer forthwith to determine how and when the quiet title action will be tried. A joint status report should be filed no later than the 26th day of August, 1996.

DONE at Laredo, Texas this 12th day of August, 1996.

UNITED STATES DISTRICT JUDGE

FILED
OCT 15 1996

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

CAROLYN H. MAFRIGE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. L-91-95**
THE UNITED STATES	§	
OF AMERICA and LOUIS	§	
DREYFUS NAT. GAS	§	
CORP.,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending is Plaintiff's motion for reconsideration of the Court's order of August 12, 1996 (Docket No. 81), which granted the United States' Rule 12(b)(1) motion to dismiss the Federal Tort Claims Act claim in this case. Plaintiff initially mischaracterized the Government's motion as being a Rule 12(b)(6) motion (Docket No. 83). In a later filing, she concedes that it was a Rule 12(b)(1) motion, but suggests that it was only a "facial" attack on jurisdiction and thereby should be treated the same as a Rule 12(b)(6) motion. The Court disagrees. This issue has been debated by the parties in multiple filings for over a year. Both sides long ago went beyond the pleadings, pointing to letters, regulations, and other extraneous matters.

The reconsideration request is largely based upon a 1979 letter from Allen C. Gates, Project Construction Engineer for the Bureau of Reclamation. The Court alluded to this letter in a memorandum of July 6, 1995 (Docket No. 60). The lease in dispute, however, was executed almost ten years later by the Bureau of Land Management. For reasons detailed in the August 12 memorandum, which need not be repeated here, the Court was and is convinced that the Government officials who leased the mineral estate at that time were exercising a "discretionary function" as that term is used in the Federal Tory Claims Act. Whether they performed that task incompetently or foolishly is not the point. As the Government suggested in its Rule 12(b)(1) motion (Docket No. 62), Plaintiff might have alternative remedies for the harm which she claims from the leasing act, but the Court remains convinced that she does not have a tort action under the FTCA.

The motion for reconsideration is **DENIED**. The motion for leave to file a second amended complaint (Docket No. 69) is **DENIED** as moot.

The "quiet title" issue remains to be resolved. The parties report that they require three months discovery on this issue. They also report that they would agree to ADR on this issue. No later than October 25, 1996, the parties shall report to the Court if they are going to proceed with ADR. If so, will they select their own mediator or do they wish the Court to appoint a mediator? If they decline to mediate, they shall be allowed until January 15, 1997 to complete discovery on the "quiet title" issue.

DONE at Laredo, Texas this 15th day of October, 1996.

United States District Judge

FILED
OCT 24 1996

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

CAROLYN H. MAFRIGE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. L-91-95**
THE UNITED STATES	§	
OF AMERICA and LOUIS	§	
DREYFUS NAT. GAS	§	
CORP.,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Plaintiff Mafrige asks the Court to reconsider its October 15 denial of leave to file a second amended complaint. Plaintiff says that the amended complaint would provide a more complete statement of facts for the court of appeals. In fact, the appeals court will look to whatever fact statement is contained in the parties' appellate briefs, not to any particular pleading in the record. Moreover, the appeals court likely will, as this Court did, examine everything in the file and not confine its analysis to any one pleading when considering the applicability of the Federal Tort Claims Act in this case. The Government apparently agrees that the proposed second amended complaint serves no purpose either in this Court or on appeal but indicated that it is not

opposing the filing of that pleading "as a matter of professional courtesy."

The problem is, however, that in a case this old, the function of a new pleading should be to help move the case toward a conclusion, not to go back to the starting point. The lengthy proposed amendment not only contains the FTCA claim which the Court has now rejected, but also resuscitates claims which the Court dismissed over a year ago (Docket No. 60). Under those circumstances, the Court is convinced that the proposed pleading will only confuse the present status of this case without serving the purpose for which it is offered. When an appeal is taken, the appeals court will see in the record that Plaintiff sought leave to file this second amended complaint on August 24, 1995, and the tendered complaint can easily be designated as part of the appellate record. If the circuit court believes that the pleading was relevant to the FTCA issue, and therefore should have been filed, it will clearly have the record to so hold. As the pleading serves no other purpose at this time, the motion for reconsideration is **DENIED**.

DONE at Laredo, Texas this 24th day of October, 1996.

_____

United States District Judge

ENTERED
AUG 22 1997

FILED
AUG 20 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CAROLYN H. MAFRIGE,	§	
PLAINTIFF	§	
	§	
v.	§	**CIVIL NO. L-91-95**
	§	
UNITED STATES OF	§	
AMERICA and LOUIS	§	
DREYFUS NATURAL	§	
GAS CORPORATION,	§	
DEFENDANTS	§	

JUDGMENT

This action came on for trial before the Court, Honorable George P. Kazen, District Judge, presiding. The final remaining issue having been duly tried and the Court having made its findings of fact and conclusions of law.

IT IS ORDERED and ADJUDGED, that judgment quieting title to the royalty interest pertinent to the property described in the deed dated July 4, 1979, recorded in Volume 167, at page 52 of the Deed Records of McMullen County, Texas should be rendered in favor of Plaintiff, Carolyn H. Mafrige, and against Defendant, the United States of America, (the "United States").

IT IS FURTHER ORDERED and ADJUDGDED, that the aforesaid deed reserved to Edna Gibbens Henry and Carolyn H. Mafrige, all royalty interest (being a non-participating royalty) in all oil, gas and other minerals

produced from the aforesaid property owned by the United States, which holds the executive leasing rights.

IT IS FURTHER ORDERED and ADJUDGED, that Plaintiff's 1/8th royalty resulting from the United States Oil and Gas Lease TXNM 77169, recorded in Volume 315, at page 310 of the Deed Records of McMullen County, Texas (the "Lease"), is burdened by the one-thirty second (1/32nd) term non-participating royalty interest reserved in a deed dated October 10, 1941 from Mary, Adele and Brookes Henderson to Carl Poenisch, recorded in Volume 30 at page 368 of the Deed Records of McMullen County, Texas. No royalty over and above said 1/8, which is inclusive of and not in addition to said 1/32 term non-participating royalty, burdens the lessee's interest. Therefore, Defendant Louis Dreyfus Natural Gas Corp. is the owner of the full leasehold estate created under and by virtue of the Lease, including the right to receive the full lessee's share of 87.5% of the oil and gas produced from the lands covered thereby. Title to said interest is hereby quieted and set at rest against the title claims of Carolyn H. Mafrige and the United States of America, and all persons claiming under them.

IT IS FURTHER ORDERED and ADJUDGED, that all moneys deposited in the registry of this Court, pursuant to this Court's Memorandum and Order of July 5, 1995, may be withdrawn and the Clerk of this Court shall forthwith deliver and pay over such monies to Plaintiff, Carolyn H. Mafrige and the law firm of Person, Whitworth, Ramos, Borchers & Morales, L.L.P., or to their order; and the Defendant, Louis Dreyfus Natural Gas Corporation shall also forthwith deliver and pay over to Plaintiff, Carolyn H. Mafrige, and the law firm of Person, Whitworth, Ramos, Borchers & Morales, L.L.P. any and all suspended royalties that may not have been paid over to the registry of the Court and any future royalties, pursuant to this Judgment.

IT IS FURTHER ORDERED and ADJUDGED, that Plaintiff's claims under the Federal Tort Claims Act are dismissed pursuant to this Court's Orders of July 6, 1995 and August 12, 1996.

Dated: August 20, 1997.

GEORGE P. KAZEN
Chief United States District Judge

FILED
JUL 30 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

CAROLYN H. MAFRIGE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. L-91-95**
UNITED STATES OF	§	
AMERICA, ET AL.,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 29, 1997, the Court conducted a non-jury trial on the final remaining issue pending in this case, i.e Plaintiff's claim to quiet title to a royalty interest pertinent to the land in question.

The Court refers to its published opinion in Mafrige v. United States, 893 F. Supp. 691 (S.D. Tex 1995). The parties have agreed that the opinion accurately states the facts in this case. The Court, therefore, adopts by reference the facts described at pages 694-696 therein. At pages 700-702 of that opinion, the Court specifically discussed the quiet title action. Among other things, the Court concluded that the deed between Edna Gibbens Henry and Carolyn H. Mafrige, grantors, and the United States of America, grantee, (Plaintiff's Exhibit 9) could be construed as reserving the

mineral estate to the grantors. The Court concluded that the ultimate meaning of the deed would have to be determined at trial but described evidence pointing to the conclusion that the parties did intend for Mafrige and Henry to reserve royalties from any future leased executed by the Government. Nothing at the trial contradicted that conclusion. On the contrary, the evidence is overwhelming that both the grantor and grantee intended the grantors to own the royalty interest, subject to the Government's executive rights. This conclusion is manifest in the original contract of sale (Plaintiff's Exhibit 6), letters by Government agents (Plaintiff's Exhibits 7 and 8), Government memos (Plaintiff's Exhibit 13) and a stipulation (Plaintiff's Exhibit 20). It is also confirmed by the conduct of the parties for at least two years.

The Court concludes that the deed in question reserved to Mafrige and Henry the non-participating royalty interest in any mineral leases negotiated on the property by the United States Government, which held the executive rights. The Court further concludes, based on the evidence and Plaintiff's concession, that Plaintiff's 1/8th royalty is burdened by a 1/32nd interest reserved in a 1941 deed from Mary, Adele and Brookes Henderson to Carl Poenisch.

DONE at Laredo, Texas this 30th day of July, 1997.

_____

Chief United States District Judge

FILED
OCT 1 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-41358

CAROLYN H. MAFRIGE
Plaintiff – Appellant

v.

UNITED STATES OF AMERICA; ET AL
Defendants

UNITED STATES OF AMERICA
Defendant – Appellee

Appeals from the United States District Court for the
Southern District of Texas, Laredo

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Carolyn H. Mafrige in the above case is Denied

ENTERED FOR THE COURT:

United States Circuit Judge
REHG-2

28 U.S.C. § 1346 United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

28 U.S.C. §2680 Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a stature or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CAROLYN H. MAFRIGE,	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION**
	§	**NO. L-91-95**
UNITED STATES OF	§	
AMERICA and LOUIS	§	
DREYFUS NAT. GAS	§	
CORP.,	§	
Defendants.	§	

PLAINTIFF, CAROLYN H. MAFRIGE'S
SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes CAROLYN H. MAFRIGE, Plaintiff in the above entitled and numbered cause and files this her Second Amended Complaint and in support thereof would respectfully show unto the Court the following, to-wit:

I.
PARTIES

Plaintiff, CAROLYN H. MAFRIGE, (hereinafter referred to as "Mafrige") resides at 11540 Green Oaks, Houston, Texas 77024.

Defendant, THE UNITED STATES OF AMERICA, (hereinafter referred to as the "United States") has already entered an appearance in this cause and a copy of this Second Amended Complaint will be served upon its attorneys of record via certified mail return-receipt requested.

Defendant, LOUIS DREYFUS NATURAL GAS CORPORATION, (hereinafter referred to as "Dreyfus") has already entered an appearance in this cause and a copy of this Second Amended Complaint will be served upon its attorneys of record via certified mail return-receipt requested.

II.
JURISDICTION

This Court has jurisdiction of the following claims and causes of action pursuant to Title 28 U.S.C.S. § 1346(b), § 1346(f) and § 1367(a). With regards to the claims and causes of action asserted by Mafrige hereinbelow, the United States has waived sovereign immunity as to such claims pursuant to Title 28 U.S.C.S. §§ 2671 et seq. and Title 28 U.S.C.S. § 2409(a). More than six months before this action was instituted, the claim(s) set forth herein was/were presented to the United States Department of the Interior, Bureau of Land Management (hereinafter referred to as "BLM"). Because the BLM has failed to make a final disposition of the claim(s) within that time, Mafrige deems such failure to be a denial thereof. Mafrige has satisfied all conditions precedent necessary for the filing and prosecution of the claims and causes of action asserted herein.

III.
FACTS

On or about May 23rd, 1979, Mafrige and her mother Edna Gibbens Henry (hereinafter referred to as "Mrs. Henry"), as vendors, and the United States entered into a Land Purchase Contract (hereinafter referred to as the "Contract"). A true and correct copy of the Contract has been attached hereto as Exhibit "A" and is incorporated herein by reference as if set out verbatim. The Contract expressly provides that it and the "subsequent conveyance" is made

subject to certain "reservations". The Contract provides as follows:

> This Contract, and subsequent conveyance, is made subject to the following reservations:
>
> 1. All of the Vendor's non-participating royalty interest in and to oil, gas and other mineral interest in and under the property described herein;
>
> 2. The Right of Vendor, herein, to receive royalty and/or rent payments from all existing oil, gas and other mineral leases until such leases expire by their own terms;

The Contract was made and prepared by the United States through its agents, servants or employees and was presented to Mafrige and her mother, Mrs. Henry, for their execution. At the time that the Contract was presented to Mafrige and Mrs. Henry, they were unfamiliar and possessed no expertise regarding the conveying and reserving of mineral interests in land sales. At the time that the Contract was given to Mafrige and Mrs. Henry for their execution, they were of the information and belief that all of the royalty interest in the mineral estate underlying the land that was to be sold to the United States would be retained or reserved by them. The United States was also of the information and belief that it would only acquire the surface estate and at most the right to execute leases covering oil, gas and other minerals under the land that was to be sold to the United States.

IV.

In a June 7, 1979 letter to Mrs. Henry, Ronald W. Mills, Acting Project Construction Engineer for the Bureau of Reclamation (hereinafter referred to as "BOR"), confirmed that the Contract contemplated that Mafrige and Mrs. Henry were reserving their royalty interests. The letter states, in part, as follows:

> The contract clearly indicates that you, along with your daughter, reserved all your nonparticipating royalty interest. This insures your right to derive all benefits from this nonparticipating royalty interest. The United States is obtaining no interest in this nonparticipating royalty.

The BOR reconfirmed this arrangement in a July 2, 1979 letter to Mrs. Henry from Project Construction Engineer Allen C. Gates. That letters states, in part, the following:

> In the Land Purchase Contract between you and the United States, and the subsequent Warranty Deed to the United States, you are retaining all your nonparticipating royalty interest in the property conveyed to the Government. It is the policy of this agency, as well as the policy of the United States, to lease property for oil and gas exploration and development. It is also the policy of the United States that, when a lease is negotiated, it will be for no less consideration (bonuses, delay rentals, and royalties) than the consideration of other similar leases on adjoining property. With this in mind, when the Government would negotiate a lease for

the property you are conveying to the United States, the royalty would be no less than similar leases on the adjacent and adjoining property not owned by the Government.

V.

Prior to July 4th, 1979, a Warranty Deed was prepared by the United States through its agents, servants or employees in order to complete the conveyance that was to be made under the Contract. The 1979 Warranty Deed was presented by agents, servants or employees of the United States to Mafrige and Mrs. Henry and executed by them on or about July 4th, 1979. A true and correct copy of the 1979 Warranty Deed has been attached hereto as Exhibit "B" and is incorporated herein by reference as if set out verbatim. The United States' agents, servants or employees prepared and submitted the 1979 Warranty Deed without the provisions contained in the Contract regarding "reservations". The 1979 Warranty Deed provides as follows:

This conveyance is subject to the following:

1. Existing rights of way for canals, ditches, flumes, railroads, highways, roads, pipelines, telephone, telegraph and electric power transmission lines.

2. Outstanding oil, gas, and other mineral interests, including leases, outstanding in the public or third parties.

3. All of the Grantors' non-participating royalty interest in and to oil, gas and other mineral interests in and under the property described herein.

4. The right of Grantors, herein to receive royalty and/or rent payments from all existing oil, gas, and other mineral leases until such leases expire by their own terms.

At the time of this conveyance, no leases burdened the mineral fee. The only outstanding interest in the property was a one-thirtysecond ($1/32^{nd}$) nonparticipating term royalty interest reserved by Mary, Adele and Brooks Henderson (hereinafter referred to as the "Hendersons") in a warranty deed to Carl Poenisch dated October 10, 1941, in "all oil and gas and other minerals produced for a term of fifty years from January 25, 1946 and so long thereafter as there is production."

By virtue of the Contract, the 1979 Warranty Deed, the aforementioned conduct and representations by agents, servants or employees of the United States, along with the amount of consideration paid by the United States for the subject property, both Mafrige and the United States assumed and acted on the belief that all of the royalty interest in the mineral estate underlying that land that was sold to the United States had been retained or reserved by Mafrige and Mrs. Henry. Upon Mrs. Henry's death, Mafrige consequently inherited all of Mrs. Henry's interest in the minerals underlying the subject lands conveyed in the 1979 Warranty Deed. Mafrige contends that she is the owner of all the royalty interest in the oil, gas, and other mineral interest(s) and mineral estate underlying the land that was sold to the United States subject to any outstanding nonparticipating term royalty interests held by third parties.

VI.

In or about late 1988, the United States acting by and through the BLM commenced procedures and solicited bids

to lease the oil, gas, and other minerals under the land which is the subject of the 1979 Warranty Deed. The United States executed a lease (hereinafter referred to as the "Lease"), with Royal Oil & Gas Corp., as Lessee, effective October 1st, 1988, covering Mafrige's interest in the mineral estate which provided for payment of a 12.5% or a one-eighth (1/8th) royalty. According to the terms of the Lease, the rentals and royalties were to be paid "to the proper office of the lessor." The Lease did not indicate whether the one-eighth (1/8th) royalty was to be reduced by the one-thirtysecond (1/32nd) nonparticipating term royalty interest reserved by the Hendersons in 1941, or whether the lessee must pay the Hendersons out of its own share. The Lease was executed by Sue Sharp, Acting Chief, Mineral Leasing Unit-1, BLM, acting in an official capacity and in the scope of her office and employment as an employee of the United States Government on behalf of the United States. A true and correct copy of the Lease has been attached hereto as Exhibit "C" and is incorporated herein by reference as if set out verbatim.

VII.

At or about the time the BLM was soliciting offers to lease the lands included in the 1979 Warranty Deed, there were ongoing operations for the leasing, drilling, exploration and development of oil and gas in the area surrounding the subject lands. The lands included in the 1979 Warranty Deed are located within a known geological structure of a producing oil or gas field. The royalty and/or fair market royalty prevalent in the surrounding area at that time was a minimum royalty of three-sixteenths (3/16ths) and it was common for mineral or royalty owners to obtain a one-fourth (1/4th) royalty. Notwithstanding these higher royalties or at least the fair market royalties prevalent in the surrounding area, the Lease provided only a 12.5% royalty.

Prior to entering into the Lease with a 12.5% royalty, the United States had expressly recognized and informed Mafrige and Mrs. Henry of the following:

> It is the policy of this agency [i.e., Bureau of Reclamation], as well as the policy of the United States, to lease property for oil and gas exploration and development. It is also the policy of the United States that, when a lease is negotiated, it will be for no less consideration (bonuses, delay rentals, and royalties) than the consideration of other similar leases on adjoining property. With this in mind, when the Government would negotiate a lease for the property you are conveying to the United States, the royalty would be no less than similar leases on the adjacent and adjoining property not owned by the Government. (Attached hereto as Exhibit "D" is a true and correct copy of the letter dated July 2, 1979 to Mrs. Henry from Project Construction Engineer, Allen C. Gates).

The aforementioned July 2, 1979, letter was either reviewed or approved by numerous other employees or agents of the BOR.

After learning that the Lease only provided for a one-eighth ($1/8^{th}$) royalty, Mafrige informed the BLM, Mineral Leasing Unit, of her dissatisfaction with said royalty. In a letter dated April 14, 1989, Mafrige's husband urged that said Lease be re-submitted for bids and requested that the United States try to obtain a higher royalty. That letter states, in part, the following:

> It is my position that a $1/8^{th}$ royalty is not sufficient interest considering the fact that the

> area is already producing, and that those well are paying 3/16^{ths}. I am not happy with the 1/8th interest and would urge that you re-submit the lease for bids and try to get a one-quarter interest and certainly not less than 3/16ths. I think that a one-quarter interest is not out of line.

With regards to obtaining or the setting of the royalty in the Lease or in providing the highest royalty for Mafrige, the discretionary function exception recognized in 28 U.S.C. § 2680(a) is not applicable because said conduct does not involve an element of judgment or choice on the part of the United States. The policies of the United States, as recognized and admitted by its own agents, servants or employees as confirmed in the letter dated July 2, 1979, from Project Construction Engineer Allen C. Gates to Mrs. Henry, provide and/or mandate that "when a lease is negotiated, it will be for no less consideration (bonuses, delay rentals, and royalties) than the consideration of other similar leases on adjoining property" and "the royalty would be no less than similar leases on the adjacent and adjoining property not owned by the Government."

In addition thereto, the governmental conduct of the United States in setting, obtaining or providing a one-eighth (1/8th), a three-sixteenths (3/16ths), or a one-fourth (1/4th) royalty for Mafrige is not based on considerations of public policy and Mafrige's royalty is not of national concern. Therefore, the United States cannot avail itself of the discretionary function exception set out I 28 U.S.C. §2680(a).

Pleading in the alternative, Mafrige asserts that Texas law mandates that the United States secure and/or obtain for Mafrige the highest royalty or at least the fair market royalty prevalent in the surrounding area.

Furthermore, the "due care" exception set out in 28 U.S.C. § 2680(a) is not implicated in Mafrige's claim for breach of fiduciary duty or duty of utmost good faith. 28 U.S.C § 2680(a) effectively excludes claims based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation. The statute [30 U.S.C. §226(b)] or regulation [43 C.F.R. § 3103.3-1(a)] prescribing the minimum royalty to be obtained by the United States are not applicable in the present situation since the United States does not own any royalty interest in this case. Mafrige's royalty has been severed from the mineral estate and it is Mafrige who owns the royalty and not the United States. The United States would not have been executing or administering a statute or regulation in leasing the minerals in question for a 12.5% royalty payable to the United States because the United States does not own any royalty. The United States cannot contend that its acts or omissions in obtaining the 12.5% royalty were done in the course of the execution of the aforementioned statute or regulation because said statute or regulation are inapplicable due to all of the royalty being owned by Mafrige. In addition, Mafrige contends that the United States failed to exercise due care in that it completely disregarded Mafrige's royalty ownership and/or interest in leasing the minerals and did not obtain the highest royalty possible or at least the fair market royalty prevalent in the surrounding area. Furthermore, Mafrige's contends that the United States failed to exercise due care in that it made the one-eighth ($1/8^{th}$) royalty in the Lease payable to itself, thus, disregarding Mafrige's royalty interest.

VIII.

Moreover, the United States included terms in the Lease which reflect that, if not in direct conflict and deliberate disregard of the interests of Mafrige, where wholly indifferent to and ignored said interests. Certain terms in the

Lease are directly in conflict with Mafrige's rights in the subject lands. Terms were included in the Lease which were solely for the United States' benefit, adversely impacting the desirability of leasing the subject lands thereby reducing the amount of royalty a potential lessee may have been willing to offer. For example, the Lease places numerous restrictions on the use of the surface of the subject lands. Such surface use restrictions were of no benefit to Mafrige or the interests held by Mafrige in the mineral estate.

IX.

On or about February 16, 1989, a Memorandum was written to the BOR in Amarillo, Texas, by Martha A. Rivera, Chief, Oil and Gas Leasing Unit of the BLM regarding the Lease. The Memorandum states, in part, as follows:

> The lessee for lease TX NM 77169, has requested that the Bureau of Land Management, as Lessor, execute a Stipulation of Interest and royalty due under this lease. However, before a commitment can be made regarding the Stipulation of Interest and because of the ambiguities contained in the records as to the royalty interests due or not due the United States we must have clarification as to exactly what royalty interest is involved. The United States must collect the 12 ½ percent, pursuant to the new Reform Act of December 22, 1987.

The Lease is one and the same as that identified as "lease TX NM 77169" in the above Memorandum.

X.

On or about February 23, 1989, a Memorandum was issued by the Head of the Minerals Acquisition Section of the BOR to the Chief of the Oil and Gas Leasing Unit of the BLM in response to the February 16, 1989, Memorandum regarding the Lease. The Memorandum provides, in part, as follows:

> All of the subject tracts are subject to nonparticipating royalty interests as shown on the enclosed title policies.
>
> Tract No.NR-108M, TX NM 77169; our records indicate that a commitment can be made regarding a stipulation of interests whereby the United States owns the fee surface and the executory mineral rights with the nonparticipating royalty owners receiving all of the leasehold royalty. The United States should receive payment for only the lease bonus and any delayed rentals. All of the royalty (8/8) belongs to the NPRI owners and applicants. The United States does not own any royalty interest and thereby is not entitled to receive any royalty payments. All royalty should be paid directly to the NPRI owner by the lessee.
>
> We suggest an attempt be made to reach an agreement with the lessees to amend the leases accordingly.

XI.

The original lessee under the Lease commenced exploration and drilled two (2) producing wells by the fall of 1989. Royalties from production were paid to Mafrige by the original lessee. The United States did not contest payments of these royalties for almost a year. Unbeknownst to Mafrige, on or about February 14, 1990, the Field Solicitor's office of the Department of Interior sent a memorandum to BLM rejecting the view taken by the BOR. It stated that the Department of Interior now believed the United States was entitled to a royalty of one-eighth ($1/8^{th}$) of all oil and gas produced from the leased lands and that Mafrige was entitled to nothing.

XII.

On August, 1, 1990, the original lessee assigned the Lease to DeKalb Energy Texas, Inc (hereinafter referred to as "DeKalb"). Upon assignment, DeKalb continued paying Mafrige royalty payments under the Lease.

XIII.

Unbeknownst to Mafrige, sometime thereafter, the United States, through the Mineral Service of the Department of the Interior, verbally notified DeKalb that it claimed the right to a one-eighth ($1/8^{th}$) royalty interest free and clear of the one-thirtysecond ($1/32^{nd}$) nonparticipating term royalty interest reserved by the Hendersons in 1946.

XIV.

On September 25, 1991, DeKalb brought suit against the United States in this Court under the Quiet Title Act, 28 U.S.C. §§ 1346(f) and 2409(a). DeKalb sought to quiet title in its favor in a "7/8 leasehold" (the right to $7/8^{ths}$ of

production) created by the Lease and the August 1, 1990 assignment. The United States counterclaimed and alleged that DeKalb had refused to pay the United States the one-eighth ($1/8^{th}$) royalty it allegedly owned. The United States also sought an accounting for the one-eighth ($1/8^{th}$) of production from the Lease and payment for damages allegedly due. Thereafter DeKalb joined Mafrige in this proceeding as a co-defendant. Mafrige responded to DeKalb's action by filing Defendant/Cross-Claimant Carolyn H. Mafrige's Answer and Cross-Claim.

XV.

On August 11, 1992, the Court realigned the parties so that Carolyn H. Mafrige became the plaintiff and her First Amended Cross-Claim was ordered to ". . .be considered a plaintiff's complaint for all purposes." Mafrige's first amended cross-claim against the United States became her complaint, and DeKalb's first amended complaint became its cross-claim. The United States' counterclaim against DeKalb became its cross-claim. On March 9, 1993, the Court granted an unopposed motion substituting Dreyfus for DeKalb as a defendant. Dreyfus acquired the Lease through mesne conveyance and/or assignments.

XVI.

Mafrige did not learn of or discover that the United States was asserting a claim to the royalty interest which had been reserved by her until January of 1992. Mafrige learned or discovered on said date that the United States was claiming a full one-eighth ($1/8^{th}$) royalty in production from the Lease. Furthermore, on said date, DeKalb informed Mafrige that all royalty payments would be suspended pending the outcome of this case.

The United States actively and wrongfully concealed from Mafrige its position and assertion that it is entitled to a one-eighth ($1/8^{th}$) royalty in production from the Lease and for one-eighth ($1/8^{th}$) of the past production resulting from the Lease until Mafrige was made a defendant to DeKalb's quiet title action against the United States in January of 1992.

XVII.

CAUSES OF ACTON

BREACH OF FIDUCIARY DUTY
AND/OR DUTY OF UTMOST GOOD FAITH

Mafrige incorporates herein by reference the allegations contained in Paragraphs I through XVI hereinabove. The subject land and the underlying minerals are located in Texas and under Texas law the holder of the executive rights or the exclusive power to manage the mineral estate owes a fiduciary duty or a duty of utmost good faith to the non-executive mineral owner and/or non-participating royalty owner. The United States, as holder of the executive rights and in exercising the executive rights, owed Mafrige a fiduciary duty and/or a duty of utmost good faith. The United States owed Mafrige the duty or was required: (a) to lease the subject property; (b) to manage the executive interest by obtaining the highest royalty possible for Mafrige or at least the fair market royalty prevalent in the surrounding area and/or to refrain from any self-dealing; (c) to negotiate and/or ensure that all royalties from the lease would be paid only to Mafrige subject to any nonparticipating term royalty interests; and/or (d) to refrain from negotiating any lease provisions harmful to Mafrige's best interests. In the alternative, the United States owed Mafrige, at the very least, a duty of utmost good faith and/or to act with the same degree of diligence, care or discretion as

would be expected of a reasonably prudent and/or average landowner or holder of the executive rights.

The United States' breached the aforementioned duties when it failed to obtain the highest royalty possible or at least the fair market royalty prevalent in the surrounding area for Mafrige. Mafrige contends that the royalty in the surrounding area and/or leases was at least three-sixteenths ($3/16^{th}$) and up to one-fourth ($1/4^{th}$).

The United States breached the aforementioned duties when the royalty in the Lease was set at or provided for only one-eighth ($1/8^{th}$) royalty.

The United States' contention that it is entitled to a 12.5% royalty from the Lease or in production therefrom constitutes self-dealing to the detriment of and in derogation of Mafrige's royalty interest. The United States' contention was not and is not consistent with and constitutes a breach of the aforementioned duties owed by the United States.

The inclusion in the Lease of terms and conditions, in conflict with Mafrige's interest in the mineral estate, was also not consistent with and constituted a breach of the aforementioned duties.

The United States' action and/or omissions constitute a breach of its fiduciary duty or duty of utmost good faith or other legal duties or standards as set out hereinabove.

As a result of the United States conduct and/or omissions and breach of the foregoing obligations and duties, Mafrige has been damaged in the amount of at least $1,899,129.82.

XVIII.

CONCEALMENT, CONTINUING CONDUCT AND REFORMATION

Mafrige incorporates herein by reference the allegations contained in paragraphs I through XVI hereinabove, and in paragraph XIX hereinbelow. The Contract and 1979 Warranty Deed were made and prepared by the United States and/or its agents, servants or employees and were presented to Mafrige and Mrs. Henry for their execution. Mafrige would not have executed the Contract or the 1979 Warranty Deed had Mafrige known that the United States would be claiming a one-eighth ($1/8^{th}$) royalty interest in production from a lease covering the subject lands. In the past, the United States has actively and wrongfully concealed its position and assertion that it is entitled to a one-eighth ($1/8^{th}$) royalty in the Lease and to one-eighth ($1/8^{th}$) of the past production from the Lease. Mafrige recently learned that the United States is asserting that it is entitled to a one-eighth ($1/8^{th}$) royalty in production from the Lease and to one-eighth ($1/8^{th}$) of the past production resulting from the Lease. This position is directly adverse to Mafrige's recognized and admitted ownership of all of the royalty in and to the oil, gas, and other mineral interest(s) in and under the property described in the Contract, the 1979 Warranty Deed and the Lease.

All tortious conduct committed by the United States has been and is continuing in nature. No mention or provision was made or has ever been made for the United States' alleged one-eighth ($1/8^{th}$) royalty interest which it is now presently asserting. Furthermore, the United States has continuously recognized the fact that it has no royalty interest in the subject lands and the United States has only recently taken the position that it is entitled to a one-eighth ($1/8^{th}$)

royalty in production and to one-eighth ($1/8^{th}$) of the past production resulting from the Lease.

The 1979 Warranty Deed did not contain the same terms as the Contract in that the word "reservation" pertaining to the non-participating royalty, although present in the Contract was not present in the 1979 Warranty Deed. Mafrige and Mrs. Henry were not aware of such omission. Mafrige did not become aware of such omission until the United States disclosed its position in this litigation. The actions of the United States in preparing the 1979 Warranty Deed and the execution of same by Mafrige and Mrs. Henry constitute mutual mistakes. Mafrige, Mrs. Henry, and the United States were acting under the mistaken belief that all of the royalty interest in the subject mineral estate had been retained or reserved by Mafrige. Mafrige is thus entitled to have the 1979 Warranty Deed reformed so as to more accurately and clearly reflect the fact that all the royalty interest was retained by Mafrige and Mrs. Henry subject only to any outstanding oil, gas and other mineral interests in the public or third parties.

XIX.

NEGLIGENCE

Mafrige incorporates herein by reference the allegations contained in paragraphs I through XVI and in paragraph XVIII hereinabove. In the course of preparing and providing the Contract and 1979 Warranty Deed, the United States had a duty to exercise reasonable care or competence in insuring that all of the royalty interest in the mineral estate underlying the land that was sold to the United States would be retained or reserved by Mafrige. The United States failed to correctly provide for the reservation of all the royalty interest to Mafrige and Mrs. Henry in the subject mineral estate underlying the land that was sold to the United States.

In addition, no mention or provision was made for the United States' alleged one-eighth ($1/8^{th}$) royalty interest which it is now presently asserting. In exercising the executive rights, the United States had a duty to secure or obtain the highest royalty for Mafrige and to refrain from negotiating any lease provisions harmful or detrimental to Mafrige's best interest. The royalty of one-eight ($1/8^{th}$) to Mafrige secured by the United States was well below the royalties in the surrounding area and/or the fair market royalty prevalent in the surrounding area. The royalty being paid in the surrounding area and/or leases was at least a royalty of three-sixteenths ($3/16^{th}$) and it was common for mineral or royalty owners to obtain a royalty of one-fourth ($1/4^{th}$). Mafrige justifiably relied upon the United States' expertise and knowledge in the alleged reservations of royalty made for the benefit of Mafrige as the grantor under the 1979 Warranty Deed. The United States is wrongfully asserting that it has a one-eighth ($1/8^{th}$) royalty in production from the Lease and is entitled to one-eighth ($1/8^{th}$) of the production from the Lease. This latest act on the part of the United States is but one of a series of acts or omissions engaged in by the United States constituting negligence. The breach of the foregoing described duties by the United States has been a proximate cause of damages to Mafrige of a sum in excess of the minimum jurisdictional limits of this Court.

XX.

SUIT TO QUIET TITLE

Mafrige incorporates herein by reference the allegations contained in paragraphs I through XVI hereinabove. The United States asserts that it owns a one-eighth ($1/8^{th}$) royalty interest in the underlying lands or in the production therefrom and that Dreyfus should account to the United States for one-eight ($1/8^{th}$) of the production from the Lease. The United States' claim to a one-eighth ($1/8^{th}$)

royalty is adverse to Mafrige's royalty interest in all of the royalty interest retained and reserved by Mafrige. The claim by the United States to a full one-eighth ($1/8^{th}$) royalty has created and/or cast a cloud on Mafrige's title to the full royalty in the oil, gas, and other mineral interest(s) and mineral estate underlying the lands which are the subject of the 1979 Warranty Deed and the Lease. Mafrige would ask this Court to remove the cloud created by the United States' claim of ownership of a $1/8^{th}$ royalty interest and declare Mafrige the owner of the full royalty interest in the oil, gas, and other mineral interest(s) and mineral estate underlying the lands which are the subject of the 1979 Warranty Deed and the Lease subject to any outstanding oil, gas and other mineral interests in the public or third parties.

XXI.

ESTOPPEL AND WAIVER

Mafrige incorporates herein by reference the allegations contained in paragraphs I through XVI hereinabove. Mafrige contends that the United States is estopped from asserting or recovering any royalty interest in the mineral estate in the lands which are the subject of the 1979 Warranty Deed or the Lease because of the conduct engaged in and/or statements made by agents, servants, or employees of the United States in recognizing or concerning its non-ownership of any royalty interest.

Mafrige contends that the United States has voluntarily waived or relinquished any royalty interest in the mineral estate in the lands which are the subject of the 1979 Warranty Deed or the Lease because of the conduct engaged in and/or statements made by agents, servants, or employees of the United States in recognizing or concerning its non-ownership of any royalty interest.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Mafrige prays that it have judgment against the United States for the following:

1. That Carolyn H. Mafrige be awarded actual damages of a sum in excess of the minimum jurisdictional limits of this Court;

2. That Carolyn H. Mafrige be awarded Pre – and post-judgment interest as allowed by law;

3. That the 1979 Warranty Deed be reformed as requested in Paragraph XVII hereinabove;

4. That the Court enter such orders or decrees removing the cloud created by the United States' claim of ownership of a one-eighth ($1/8^{th}$) royalty interest and declaring Mafrige the owner of the full royalty interest in the mineral estate in the lands which are the subject of the 1979 Warranty Deed subject to any outstanding oil, gas and other mineral interests in the public or third parties; and

5. For such other and further relief to which Carolyn H. Mafrige may show herself justly entitled to receive.

Respectfully Submitted,

PERSON, WHITWORTH, RAMOS,
BORCHERS & MORALES, L.L.P.
602 E. Calton Road
P.O. Drawer 6668
Laredo, Texas 78042-6668
Telephone: (956) 727-4441
Facsimile: (956) 727-2696

By: _____
RICHARD G. MORALES, JR.
State Bar No. 14419000

Attorney for Plaintiff,
CAROLYN H. MAFRIGE

Of Counsel:
MARK D. WILLETT
PERSON, WHITWORTH, RAMOS,
BORCHERS & MORALES, L.L.P.
SBN: 00784145
Attorney for Plaintiff,
CAROLYN H. MAFRIGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff Carolyn H. Mafrige's Second Amended Complaint has been forwarded via certified mail, return receipt requested on this the 24th day of August, 1995, to the following:

Mr. William B. Burford
HINKLE, COX, EATON, COFFIELD & HENSLEY
P.O. Box 3580
Midland, Texas 79702

Mr. Ricardo D. Palacios
P.O. Box 3002
Laredo, Texas 78044-3002

Mr. Charles Wendlandt
Asst. U.S. Attorney
Wilson Plaza, Suite 1200
606 N. Carancahua
Corpus Christi, Texas 78476

RICHARD G. MORALES, JR.

FORM 7., 596
(10-46)
Bureau of Reclamation

OFFICIAL FILE OPY

Date	Surname	Code
7-2	AG	RO
7/16	ALLIS	PCE
7-2	RWM	DE
7-2	MR	FE
7/3	VR	AD
7/10	WKS	WS
7/2	NN	NN
8/10	NEP	NP

JUL 2 1979

780.

Mrs. Edna Henry
Tilden, Texas 78072

Dear Mrs. Henry:

This letter is in reference to your recent questions pertaining to mineral activity in the Nueces River Project, Choke Canyon Dam.

The Bureau of Reclamation is acquiring various interest in oil, gas, and other minerals in the project area. In accordance with your question, it is not the policy of the Bureau of Reclamation to unilaterally forbid all exploration and development of oil, gas, and other minerals within the Choke Canyon Reservoir. It is, however, the policy of this office to be able to regulate, manage, and, in certain circumstances, limit this exploration and development. This is necessary in order that the integrity of the project can be protected for

project purposes – namely, providing municipal and industrial water and providing recreation.

In the Land Purchase Contract between you and the United States, and the subsequent Warranty Deed to the United States, you are retaining all you nonparticipating royalty interest in the property conveyed to the Government. It is the policy of this agency, as well as the United States, to lease property for oil and gas exploration and development. It is also a policy of the United States that, when a lease is negotiated, it will be for no less consideration (bonuses, delayed rentals, and royalties) than the consideration of other similiar leases on adjoining property. With this in mind, when the Government would negotiate a lease for the property you are conveying to the United States, the royalty would be no less than similiar leases on the adjacent and adjoining property not owned by the Government.

I hope this information answers your question regarding the Bureau of Reclamation's leasing policies.

Sincerely yours,

Ronald N. Mills
FOR
Allen C. Gates
Project Construction Engineer

Frobinson/nn/7/2/79

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APR 24 1989

MAFRIGE & KORMANIK, P.C.
A Professional Corporation
Suite 200 Mafrige Building
411 Fannin Street
Houston, Texas 77002

Attorneys:
Steven F. Mafrige
Ronald J. Kormanik
J. Michael Boswell
Sophia A. Mafrige

Area Code 713
Telephone 228-8898
Fax 222-1512

April 14, 1989

Bureau of Land Management
Mineral Leasing Unit
P.O. Box 1449
Santa Fe, New Mexico

ATTN: Ms. Jackie Morales

Re: Tract No. NR-108 Henry, Edna G.
Nueces River Project, McMullen County,
Texas

Dear Ms. Morales:

I understand that there have been some bids concerning the above-subject property to have an oil and gas well drilled. I further understand that there is an offer for $1/8^{th}$ royalty interest.

As you are aware I am the holder of the royalty interest and as such I believe that I am entitled to a good faith and fair dealing consideration when you enter into a contract for a well. As you are also aware, it is a proven field with active producing drill. All of those other producing wells are

paying a 3/16ths royalty based upon a lease which was negotiated when there was no production in the area. I see no reason why the lease that you issue cannot bring a minimum of 3/16ths when the lease is in an area where there is proven production on all sides. I would expect that if you were to demand a one-quarter royalty interest that it is possible you could get it considering that it is a proven field. In any event, I don't see why any lease you would enter into would bring anything less than 3/16ths which is what is being paid on all of the other existing wells.

It is my opinion that as the holder of the surface and mineral estate you owe a fiduciary responsibility to the royalty interest holders to negotiate leases in good faith. It is my position that a $1/8^{th}$ royalty is not a sufficient interest considering the fact that the area is already producing, and that those wells are paying 3/16ths. I am not happy with the $1/8^{th}$ interest and would urge that you re-submit the lease for bids and try to get a one-quarter interest and certainly not less than 3/16ths. I think that a one-quarter interest is not out of line.

If there is anything else I can do to assist you in this case or if there is any information I can provide please do not hesitate to contact me. I would appreciate you putting me on the mailing list for any information regarding the leasing of this property.

Sincerely yours,

Stevens F. Mafrige

SFM/dm/002

Cc: United States Department of the Interior
Bureau of Reclamation
714 S. Tyler, Suite 201
Amarillo, Texas 79101-2386

United States Department of the Interior
Bureau of Reclamation
ATTN: Regional Director, GP-420
P.O. Box 36900
Billings, Montana 59107-6900

United States Department of the Interior
Bureau of Reclamation
Southwestern Region
ATTN: Eugene Hinds, Regional Director
Commerce Building
714 S. Tyler, Suite 201
Amarillo, Texas 79101-2386

USE OF THE SURFACE?

A. I WOULD THINK THEY WOULD DO THAT. ARE YOU ASKING ME DID I UNDERSTAND IT THEN OR NOW? I MEAN, IF YOU TELL ME IT'S SO, I'M SURE IT'S SO. I'M NOT FAMILIAR WITH THE GOVERNMENT'S PROCEDURES.

Q. WELL, HERE'S WHAT I'M TRYING TO FIND OUT.

A. OKAY.

Q. IT'S WHETHER YOU OBJECT OT THE TERMS ON THIS LEASE RIGHT HERE, THE REQUIREMENTS THAT THE BUREAU OF RECLAMATION IMPOSED ON THE USE OF THE SURFACE.

A. WELL, IF IT DEVIATED FROM THE EARNEST MONEY CONTRACT, MY ANSWER WOULD BE YES AND ... BUT DO YOU WANT ME TO READ THIS WHOLE THING AND THEN ... AND TELL YOU WHAT I OBJECT TO?

Q. YES, SIR.

(WITNESS COMPLYING

MR. MORALES: YOUR HONOR, IF I MIGHT JUST OBJECT. I THINK MR. WENDLANDT IS TRYING TO GET INTO ISSUES THAT WOULD BE COVERED IF THE F.D.C.A. ISSUE WAS STILL BEFORE THE COURT, REGARDING THE USE OF THE SURFACE AND THINGS LIKE THAT.

THE COURT: YES, I'M NOT SURE WHAT . . . I'M SCANNING THESE MYSELF AND I'M NOT

SURE WHAT ... THEY'RE SORT OF MECHANICAL CONDITIONS ABOUT HOW TO DO THE LEASE.

WHAT IS THAT ALL ABOUT?

MR. WENDLANDT: YOU HONOR, I'M TRYING TO FIND OUT WHAT WAS HIS UNDERSTANDING OF WHY THE GOVERNMENT WANTED TO BE ABLE TO CONTROL THE LEASING AND THE PURPOSES FOR WHICH IT WAS –

THE COURT: OKAY. BUT HE'S NOT - -

THE WITNESS: I CAN RESPOND TO THAT A LOT EASIER THAN I CAN FROM READING THIS.

Q. (MR. WENDLANDT RESUMING) ALL RIGHT, WHY DON'T YOU TRY TO EXPLAIN THAT, SIR?

A. WELL –

THE COURT: WELL, I DON'T MIND HEARING IT, EXCEPT I'VE GOT OTHER THINGS TO DO. NOW, HE'S NOT ... THAT'S NOT THE QUESTION HERE. I MEAN, HE CONCEDES THAT THEY GAVE UP THE EXECUTIVE RIGHTS. WHAT DIFFERENCE DOES IT MAKE WHY THEY WANTED THEM? I MEAN, NOBODY IS DISPUTING THEY GAVE UP THE EXECUTIVE RIGHTS.

RIGHT, MR. MAFRIGE?

THE WITNESS: THAT'S CORRECT, YOU HONOR.

THE COURT: I MEAN, YOU JUST SAID THAT.

THE WITNESS: THAT'S CORRECT.

THE COURT: I GUESS, ORIGINALLY, YOU WANTED NOT TO, BUT YOU FINALLY DID AND - -

THE WITNESS: THAT'S CORRECT.

THE COURT: SO WHY THE GOVERNMENT WANTED THEM, THAT'S NOT ON ARGUMENT.

Q. (MR. WENDLANDT RESUMING) NOW, IN 1979, THERE WASN'T ANY PRODUCTION THERE, YOU SAID. SO WHAT SORT OF A ROYALTY WAS CONTEMPLATED BY THE PARTIES AT THE TIME?

A. WELL, BETWEEN THE TIME THAT THERE WAS PRODUCTION ... AND, OF COURSE, BEFORE THERE WAS PRODUCTION, THE LEASE THAT THE HENRYS ENTERED INTO AT THAT TIME WAS FOR ... CALLED FOR A THREE-SIXTEENTH ROYALTY.

Q. AND WHICH LEASE IS THAT, SIR?

A. THERE WERE LEASES THAT WE ENTERED INTO THAT RESULTED IN PRODUCTION IN 1983, AND THAT WAS ON THEIR TRACT OF LAND, THAT THEY LEASED OUT FOR THREE-SIXTEENTHS. IF THAT'S WHAT YOU ... DID I UNDERSTAND YOUR QUESTION?

Q. WELL, I'M TRYING TO FIND OUT ... WHAT I'M GOING BACK TO IS THE DATE DURING

THE ... AT THE TIME THAT THE EARNEST MONEY CONTRACT AND DEED WERE SIGNED.

A. THERE WAS NO PRODUCTION. AND AS FAR AS I KNOW, THERE WERE NO LEASES IN FORCE.

Q. WELL, ISN'T IT TRUE THAT A ONE-EIGHTH ROYALTY WAS OFTEN CONSIDERED SORT OF THE BENCH-MARK ROYALTY IN THE OIL BUSINESS?

A. IN THE OLD DAYS. I THINK BY THE TIME ALL THIS OCCURRED, NO, THAT WOULD'VE BEEN A VERY POOR LEASE, AS EVIDENCED BY THE FACT THAT EVERYBODY OUT THERE, IN THE WILDCAT SITUATION, WAS GETTING THREE-SIXTEENTHS. AND IF YOU'RE ASKING ME WHEN THE GOVERNMENT DID THEIR LEASE, THERE WAS PRODUCTION BOTH TO THE NORTH, TO THE SOUTH, THE EAST AND THE WEST. JUST ABOUT EVERYWHERE. IT WAS AN ISLAND AND YOU NEGOTIATED ONE-EIGHTH, WHICH I THINK WAS LUDICROUS. BUT ANYWAY, THAT'S ... IF YOU'RE ASKING ME ABOUT THAT, THAT'S MY OPINION. BUT ONE-EIGHTH WAS HISTORY. I MEAN, I WOULD SAY THAT AT THE TIME THIS OCCURRED, NOBODY WAS DOING ONE-EIGHTHS.

Q. DID YOU CONSIDER RESERVING A THREE-SIXTEENTHS ROYALTY IN THE DEED?

A. YOU MEAN AT THE TIME WE NEGOTIATED WITH THE GOVERNMENT?

Q. YES, SIR.

A. TO ME, THREE-SIXTEENTHS IS LESS THAN EIGHT-EIGHTHS OR ONE HUNDRED PERCENT. WE WANTED ONE HUNDRED PERCENT AND THAT'S WHAT WE NEGOTIATED FOR AND THAT WAS THE BASIS UPON WHICH THE DEED WAS MADE. OR THE DEAL WAS MADE. AND IT WAS WHAT TURNED THE DEAL AROUND WITH THE GOVERNMENT. DID I ANSWER YOUR QUESTION?

Q. WHAT I'M TRYING TO FIND OUT IS THIS. DID YOU CONSIDER ANY ALTERNATIVES? FOR EXAMPLE, RESERVING ... CONVEYING THE LAND AND RESERVING A NON-PARTICIPATING THREE-SIXTEENTHS ROYALTY?

A. I GUESS THE ANSWER IS NO, BECAUSE WE WERE INTERESTED IN A HUNDRED PERCENT, NOT THREE-SIXTEENTHS. I MEAN ... AND CORRECT ME IF I'M WRONG. BUT A HUNDRED PERCENT IS BETTER THAN THREE-SIXTEENTHS?

Q. AND WHERE WOULD YOU GET SOMEONE - - WHERE DID YOU EXPECT SOMEONE TO PAY A ONE HUNDRED PERCENT ROYALTY? I MEAN, WHAT WOULD THE OPERATOR GET OUT OF IT?

A. OH, ARE YOU ASKING ME WHAT THE GOVERNMENT SHOULD'VE DONE?

Q. NO.

A. YOU'RE LOSING ME HERE SOMEWHERE. I MEAN, IN TALKING ABOUT THE DEAL WITH THE GOVERNMENT, WE INSISTED ON A HUNDRED PERCENT. THREE-SIXTEENTHS NEVER

CAME UP AT THAT POINT IN TIME. NOW, IF YOU'RE- -

Q. WE'RE TALKING ABOUT SOMETHING DIFFERENT.

A. HUH?

Q. WHAT I'M RFERRING TO IS THIS. YOU KNOW YOU COULD'VE SOLD THE PROPERTY AND RESERVE A ONE-THIRTYSECOND ROYALTY, LIKE THE HENDERSON'S DID; IS THAT CORRECT?

A. I COULD'VE, BUT WHY WOULD YOU DO IT IF YOU COULD RESERVE A HUNDRED PERCENT? AND YOU'RE LOSING ME HERE. LOOK, I'M NOT AN OIL AND GAS LAWYER, BUT I THINK I'M A LITTLE BIT OF A BUSINESS MAN AND THE ECONOMICS THERE ARE NOT THE SAME. I MEAN, A HUNDRED PERCENT IS BETTER THAN THREE-SIXTEENTHS. AND IF I MADE A MISTAKE ON MY MATH THERE, THEN I APOLOGIZE. BUT THAT'S THE WAY I SAW IT AND THAT'S THE WAY I ANSWERED THE QUESTION.

Q. OKAY.

A. A HUNDRED PERCENT WAS BETTER THAN ...

Q. ALL RIGHT. IF YOU LEASE ... WHY WOULD AN OPERATOR

THAT'S MY UNDERSTANDING.

Q. THE GOVERNMENT GETS THE EXECUTIVE RIGHTS, CORRECT?

A. THAT'S CORRECT.

Q. AND THEY HAVE A RIGHT TO SIGN LEASES, OKAY?

A. THAT'S CORRECT.

Q. NOW, HOW ARE THEY GOING TO PROTECT YOUR ONE HUNDRED PERCENT N.P.R.I.? WHAT ARE YOU EXPECTING THEM TO DO?

A. I JUST HAD TO ENTER INTO A DEAL THE OTHER DAY WHERE I HAVE ONLY HALF THE MINERALS ... NO. I HAD A HUNDRED PERCENT OF THE MINERALS BUT ONLY HALF THE ROYALTY. SO I'M PUT UNDER A DUTY NOT TO GIVE AWAY OR SELL THE DEAL IN THAT SITUATION, I ASSUME. I DON'T KNOW WHETHER THE COURT ... WHETHER THE GOVERNMENT IS NOW ... IF THEY'RE CHARGED WITH THE SAME RESPONSIBILITY I AM OR NOT, BUT THAT'S A RESPONSIBILITY EVERYBODY HAS, THAT'S PUT IN THAT POSITION, OF MAKING A FAIR DEAL.

Q. IF YOU'RE RESERVING ONE HUNDRED PERCENT OF THE N.P.R.I., LIKE YOU'RE SAYING, OKAY, IN THE CONTRACT AND IN THE DEED –

A. YEAH.

Q. -- AND THE GOVERNMENT IS GOING TO MAKE A LEASE, HOW DO YOU EXPECT THEM TO PROTECT YOU? WHAT FRACTION SHOULD THEY

RESERVE TO PROTECT YOUR ONE HUNDRED PERCENT INTEREST?

A. OH, YOU'RE ASKING MY OPINION ON THAT? I THINK IT'S VERY EASY.

Q. OKAY.

A. I THINK THEY SHOULD HAVE ONE-FOURTH OF THE ROYALTY; THAT I THINK SHOULD'VE BEEN RESERVED.

Q. WHY ONE-FOURTH?

A. BECAUSE AT THE TIME THAT THIS WENT OUT FOR LEASE, THERE WAS PRODUCTION BOTH TO THE NORTH AND TO THE SOUTH, AND I'M TALKING ABOUT FAIRLY SUBSTANTIAL PRODUCTION. TWENTY-FIVE PERCENT, I THINK, WOULD BE THE BARE MINIMUM THAT YOU WOULD GET WHEN YOU'RE AN ISLAND WITHIN A KNOWN PRODUCING FIELD. AND THAT'S ME SPEAKING AS A BUSINESS PERSON, SOMEONE THAT'S ENGAGED IN BUSINESS. I WOULD SAY THAT WOULD BE THE BARE MINIMUM THAT ANYBODY, THAT WAS TRYING TO DO THEIR JOB, WOULD'VE GOTTEN UNDER THESE FACTS. THE FIVE DOLLAR, OR WHATEVER THEIR PER ACRE AMOUNT WAS, WAS A TREMENDOUS COUP FOR A ROYAL. IT WAS A REAL POOR DEAL FOR THE GOVERNMENT. BUT YOU KNOW, YOU'RE ASKING ME –

Q. ALL RIGHT. IF THE GOVERNMENT WERE TO RESERVE TWENTY-FIVE PERCENT, THEN YOUR N.P.R.I. WOULD BE PROTECTED? IT WOULD COME OUT OF THAT TWENTY-FIVE PERCENT? IS THAT WHAT YOU'RE SAYING?

A. IF THE GOVERNMENT HAD DONE THEIR JOB, I WOULD SAY TWENTY-FIVE PERCENT OF THE NON-PARTICIPATING ROYALTY ... WE WOULD THEN HAVE TO PAY THE ONE THIRTYSECOND OUT OF THAT TWENTY-FIVE PERCENT.

Q. OKAY. YOU WOULD GET THE TWENTY-FIVE AND THEN YOU WOULD PAY THE HENDERSON ROYALTY?

A. THAT'S RIGHT. WELL, I WOULDN'T PAY IT, BUT IT WOULD BE CARVED OUT. I ASSUME THE PRODUCER WOULD PAY IT DIRECTLY.

Q. OKAY.

MR. PALACIOS: I PASS THE WITNESS, YOU HONOR.

MR. MORALES: JUST ONE CLARIFICATION QUESTION, YOUR HONOR, IF I MAY.

THE COURT: OKAY.

REDIRECT EXAMINATION

BY MR. MORALES:

Q. MR. MAFRIGE, AS FAR AS THE INTENT TO MRS. MAFRIGE AND MRS. HENDERSON TO RETAIN ALL OF THE ROYALTY, AS FAR AS THE AMOUNT OR THE SIZE OF THE ROYALTY, THAT WOULD DEPEND ON WHATEVER LEASE WAS EXECUTED IN THE FUTURE. ISN'T THAT CORRECT?

A. ABSOLUTELY.

Q. ALL RIGHT.

A. THERE WAS NO INTENT TO COME UP WITH A VALUE AT THAT TIME.

Q. RIGHT. AND THE WORD "NON-PARTICIPATING" WAS PUT IN THERE BY THE GOVERNMENT AND WAS IT NOT PUT IN THERE BY THE GOVERNMENT TO MAKE IT CLEAR THAT THEY HAD THE EXECUTIVE RIGHTS AND NOT TO YOUR WIFE AND YOUR MOTHER-IN-LAW?

A. ABSOLUTELY. IT WAS OF CRITICAL IMPORTANCE TO THEM TO CONTROL WHAT WENT ON WITHIN THE RESERVOIR.

Q. ALL RIGHT.

Supreme Court, U.S.
FILED
MAR 3 - 2000
CLERK

No. 99-1110

In the Supreme Court of the United States

CAROLYN H. MAFRIGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
MARK B. STERN
JONATHAN H. LEVY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15pp

QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the discretionary function exception to the Federal Tort Claims Act's waiver of sovereign immunity applies to the terms of a lease of federal land because the Secretary of the Interior has broad discretion regarding whether to lease the land and under what terms.

2. Whether the courts below correctly determined that Texas law does not recognize a tort for "negligent leasing" under the facts alleged by petitioner.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 189 F.3d 466 (Table). The final judgment of the district court (Pet. App. 39a-41a) is unreported. The district court's earlier opinion granting the United States' motion to dismiss (Pet. App. 28a-33a) is unreported. An earlier opinion of the district court setting forth applicable facts (Pet. App. 3a-27a) is reported at 893 F. Supp. 691.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1999. A petition for rehearing was denied on October 1, 1999 (Pet. App. 44a). The petition for a writ of certiorari was filed on December 30, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979 the United States purchased property in Texas from petitioner Carolyn Mafrige and her mother. Pet. App. 4a-6a. Petitioner retained a non-participating royalty interest in the property's mineral rights. *Id.* at 39a-40a.[1] In 1988, the United States leased the mineral rights for the land acquired from petitioner to the Royal Oil & Gas Company, pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351 *et seq.* Pet. App. 7a. Petitioner was dissatisfied with the terms of the mineral lease, which provided for a 1/8 royalty. Based on leases of mineral rights on adjacent properties, she believed that a royalty of 3/16 or 1/4 could have and should have been obtained. *Id.* at 8a. However, the United States refused to renegotiate the lease. *Ibid.*

2. This action began as a quiet title action involving the leasehold and the royalty interests. The district court quieted title by holding that Royal Oil's successor held the full leasehold, including 7/8 of the minerals produced thereby, and that petitioner held the entire royalty interest from the lease. Pet. App. 39a-40a.

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[1] Texas courts describe a non-participating royalty as follows:

> A "non-participating royalty" does not entitle the owner to produce the minerals himself, or permit him to join in a lease of the mineral estate to which the royalty is appurtenant, or entitle him to share in bonus or delay rentals that may be paid for the lease, but merely entitles him to a share of production under the lease free of exploration and production expenses.

Pickens v. *Hope*, 764 S.W.2d 256, 264 (Tex. Ct. App. 1988).

That portion of the district court's judgment is final, was not appealed, and is not relevant to this petition.

In the quiet title action, petitioner filed cross claims against the United States with respect to the lease for (1) "concealment, continuing conduct, and reformation," (2) negligence, and (3) "breach of fiduciary duty or duty of utmost good faith." Pet. App. 9a. The district court granted the United States summary judgment with respect to the first claim (which the court interpreted as a reformation claim) based on the United States' sovereign immunity. *Id.* at 16a-17a. The petition does not relate to that claim.

With respect to the negligence and breach of fiduciary duty claims, the district court noted that such claims were brought under the Federal Tort Claims Act (FTCA), which makes state law applicable to the United States, with certain exceptions. Pet. App. 21a, 25a-26a. The district court found that applicable Texas law places no duty on a lessor with respect to the drafting of a lease. *Id.* at 21a-22a. Similarly, the district court found that under Texas law there is no claim for negligent leasing separate from the claim for breach of fiduciary duty or duty of utmost care. *Id.* at 22a-23a.

Finally, with respect to the fiduciary duty claim, the district court held that the United States was immune from such claims under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). Pet. App. 28a-33a. In evaluating the applicability of the discretionary function exception, the district court applied the two-pronged test of *United States* v. *Gaubert*, 499 U.S. 315 (1991). First, the district court concluded that the lease involved an element of judgment or choice as part of an overall statutory scheme for managing federal mineral interests. Pet. App. 30a-31a. Second, the district court concluded that the act of entering into

the lease was grounded in public policy. *Id.* at 31a-32a. Accordingly, the district court dismissed petitioner's breach of fiduciary duty claim. *Id.* at 33a.

3. The court of appeals affirmed in an unpublished opinion for the reasons stated by the district court. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Petitioner asserts that the lease constituted an unconstitutional taking of her property without just compensation and that the denial of her FTCA claims is a violation of the Equal Protection Clause because it treats her differently from a similarly situated Native American. Those claims were not properly raised before, nor considered by, the courts below. To the contrary, petitioner raised those claims for the first time in her petition for rehearing in the court of appeals. Accordingly, they should not be considered by this Court. See *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977). In addition, as discussed more specifically below, each claim of a constitutional violation is without merit.

b. Petitioner claims that by entering into a lease with what she viewed as a below-market royalty, the government took her property without just compensa-

tion. But it is not possible for the government to effect a taking by exercising rights it had indisputably previously obtained by contract. Moreover, the district court lacked jurisdiction over any takings claim, as jurisdiction over such claims is vested exclusively in the Court of Federal Claims by the Tucker Act. 28 U.S.C. 1491; see *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985).[2]

c. Petitioner claims that her inability to obtain redress in this situation is a violation of the Equal Protection Clause because a similarly situated Native American would be able to obtain redress and because strict scrutiny would apply to any difference in treatment between herself and a Native American. Pet. 7-8, 20-23. Regardless of how a similarly situated Native American would be treated, this Court has held that classifications based on Native American tribal status and land tenure are not suspect under the Equal Protection Clause and that statutes embodying such classifications are reviewed only for a rational basis. *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-502 (1979); see *Morton* v. *Mancari*, 417 U.S. 535, 554-555 (1974) (upholding Bureau of Indian Affairs hiring preference for tribal Indians based on rational basis review and collecting cases); see also *Rice* v. *Cayetano*, No. 98-818 (Feb. 23, 2000), slip op. 22-24. Thus, even if a similarly situated Native American's land might be treated differently (which petitioner has not shown), such different treatment would be amply justified by the unique history of the relationship between Native

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[2] Petitioner's claim obviously exceeded the $10,000 jurisdictional threshold of the Tucker Act. See Pet. App. 8a (noting that petitioner's FTCA claim was for $1,899,129.82).

Americans (including their land) and the United States. See, *e.g.*, *Confederated Bands*, 439 U.S. at 500-501.

2. a. Petitioner incorrectly asserts (Pet. 6-7) that the court of appeals erred in its determination that the discretionary function exception applied to the United States' lease of the property. As petitioner agrees (Pet. 15), the proper standard for determining the applicability of the discretionary function exception is that announced by this Court in *United States* v. *Gaubert*, 499 U.S. 315 (1991). The decisions below apply *Gaubert*. Pet. App. 29a-32a (district court opinion relying on *Gaubert*); *id.* at 2a (court of appeals' opinion affirming "for essentially the same reasons" given in district court opinion). That fact alone makes review by this Court unwarranted since, if there were error below, it would at most consist of a misapplication of settled legal principles to the specific facts of this case. Moreover, because the court of appeals' brief opinion was unpublished, it did not definitively settle the law of the Fifth Circuit regarding any issue. For that reason, too, further review is unwarranted.

b. In any event, the courts below properly applied *Gaubert*. Under *Gaubert*, an act falls within the discretionary function exception if (1) it is discretionary in that it involves an element of judgment or choice and (2) it is based on considerations of public policy. *Gaubert*, 499 U.S. at 322-323. Here the district court correctly noted that relevant statutes gave the executive branch "discretion to determine the terms under which this mineral interest would be leased." Pet. App. 31a. See also 30 U.S.C. 352 (providing that "all deposits of [minerals] * * * may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof"). Indeed, this Court has previously

noted the extensive discretion granted to the Secretary by the applicable statutes. See *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965) (stating that the Mineral Leasing Act "left the Secretary discretion to refuse to issue any lease at all on a given tract"); *Boesche* v. *Udall*, 373 U.S. 472, 481 (1963) (holding that the Mineral Leasing Act "was intended to expand, not contract, the Secretary's control over the mineral lands of the United States"); see also *Dunn* v. *Ickes*, 115 F.2d 36, 37-38 (D.C. Cir.) (holding that because Mineral Leasing Act grants discretion to Secretary, court could not compel Secretary to act on lease application by mandamus), cert. denied, 311 U.S. 698 (1940).

Petitioner asserts (Pet. 15-16) that despite the statutory delegation of discretion to the Secretary, the Secretary lacked discretion because an engineer in the Bureau of Reclamation had written a letter to petitioner ten years before the lease was executed in this case stating that the government's policy was to enter into mineral leases for royalties similar to those on comparable adjoining properties. Had petitioner believed that the existence and continuation of that policy was essential to its original bargain with the government, petitioner should have seen to it that a clause to that effect was included in the deed. In any event, because such a letter could do nothing to eliminate the Secretary's statutory discretion, petitioner's argument fails. See 43 C.F.R. 1810.3 (1999) (a statement by a Department of the Interior employee does not create any rights not authorized by statute); Pet. App. 35a.

c. With respect to the second prong of the *Gaubert* analysis, this Court held that:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

499 U.S. at 324-325. Against this presumption, petitioner argues (Pet. 19-20) that the decisions regarding the terms of the lease at issue were not policy-based because they involved only the amount of royalty that petitioner (a private party) would receive and thus had nothing to do with public policy. The courts below properly rejected that argument because the terms of the lease must be viewed as parts of an integrated whole implicating a complex weighing of competing policy interests.

The lease was made pursuant to the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, two comprehensive statutes designed to preserve the nation's natural resources while also allowing for the extraction and retention of strategically important mineral resources. See *Boesche*, 373 U.S. at 481 (noting that the Mineral Leasing Act of 1920 was

concerned with "the prevention of an overly rapid consumption of oil resources" and that one of the statute's chief goals was "[c]onservation through control"). In leasing mineral rights, the Department of the Interior weighs multiple competing policy interests, including the governmental duties "to regulate, manage, and, in certain circumstances, limit * * * exploration and development," to "provid[e] municipal and industrial water," and to "provid[e] recreation." Pet. App. 70a-71a.

In crafting a lease, the Department of the Interior must include terms to fulfill its public policy role as protector and regulator of natural resources. Those terms may have a negative effect on the amount of royalty that can be received. Petitioner in fact alleged that "[t]erms were included in the Lease which were solely for the United States' benefit, adversely impacting the desirability of leasing the subject lands thereby reducing the amount of royalty a potential lessee may have been willing to offer." Pet. App. 57a. In order to obtain a higher royalty, as petitioner now asserts should have been done, some other concession thus would have been necessary, such as omitting terms from the lease that protect the United States' policy interests. Fixing the lease's terms in their entirety, including the royalty amount, is a discretionary act grounded in policy. The courts below correctly applied *Gaubert* and found that the negotiation and approval of the lease fell within the discretionary act exception, foreclosing the possibility of an FTCA action.

3. Finally, petitioner asserts that the courts below erred in their interpretation of Texas law with respect to her negligent leasing claim. Pet. 8, 23-25. This Court does not "normally grant petitions for certiorari solely

to review what purports to be an application of state law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996). There is no unusual circumstance to justify departure from that general rule here.

Moreover, the lower courts correctly applied Texas law. As the district court noted, under Texas law, a claim that an executive rights holder failed to obtain an adequate royalty on behalf of a non-participating royalty interest holder is a claim of breach of fiduciary duty (or the duty of utmost good faith). Pet. App. 22a-23a; *Manges* v. *Guerra*, 673 S.W.2d 180, 183 (Tex. 1984). Accordingly, all such claims must be brought as breach of fiduciary duty (or duty of utmost good faith) claims, rather than under the non-existent tort of negligent leasing. See, *e.g.*, *Dearing, Inc.* v. *Spiller*, 824 S.W.2d 728 (Tex. Ct. App. 1992); *Mims* v. *Beall*, 810 S.W.2d 876 (Tex. Ct. App. 1991).[3] Finally, even if a negligent leasing claim did exist under Texas law, any such claim here would be barred by the discretionary function exception to the FTCA. See pp. 6-9, *supra*; *Webster* v.

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[3] The two state cases cited by petitioner (Pet. 24) are not to the contrary, since neither one recognized a cause of action for negligent leasing. In *Jewett* v. *Capital National Bank*, 618 S.W.2d 109 (Tex. Ct. App. 1981), the court recognized that a trustee appointed to administer a trust for the benefit of the settlor's children could "exercise his fiduciary duty in such a negligent manner that his lack of diligence will result in a breach of his fiduciary duty." *Id.* at 112. In *Penix* v. *First National Bank*, 260 S.W.2d 63, 68 (Tex. Ct. App. 1953), the court considered (and rejected on factual grounds) a claim that a testamentary trustee should be removed from that position because of alleged negligence or mismanagement. These cases thus at best recognize that under Texas law a claim of breach of fiduciary duty can be based on violation of a duty of care. They do not establish that Texas law recognizes a cause of action for negligent leasing by a trustee, apart from a claim of a breach of fiduciary duty.

United States, 823 F. Supp. 1544, 1552 (D. Mont. 1992) (finding claim of negligent leasing against the Secretary barred by the discretionary function exception), aff'd, 22 F.3d 221 (9th Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
MARK B. STERN
JONATHAN H. LEVY
Attorneys

MARCH 2000